Supreme Court, U.S.
FILED
04 206 AUG 26 2004

No. 04- ____

In the Supreme Court of the United States

PETER M. HAGAN,

Petitioner,

v.

WARNER/ELEKTRA/ATLANTIC CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

DONALD B. HORDES
Counsel of Record

SCHWARTZ, MANES & RUBY
2900 CAREW TOWER
441 VINE STREET
CINCINNATI, OH 45202-3090
(513) 579-1414

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc.
800.890.5001

QUESTIONS PRESENTED

1. What are the appropriate standards lower courts should follow in determining whether a private sector employer has followed its voluntary affirmative action plan and subsequent enabling race-conscious remedial measures in making an adverse employment decision to the detriment of a majority employee?

2. What are the appropriate standards lower courts should follow in determining whether a voluntary affirmative action plan upon which a private sector employer relies to institute race-conscious hiring and promotion measures to the detriment of a majority employee is valid?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Petitioner has no corporate affiliations.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding and
Corporate Disclosure Statement ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Statement of Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 2

I. Overview of the Case 2

II. Background of the Case 3

III. Proceedings Below 4

Reasons for Granting the Petition 6

I. Review is Warranted Because the Decision of the Sixth Circuit is in Direct Conflict with the Decisions of the United States Court of Appeals in other Circuits as to How a Reverse Discrimination Plaintiff can Prove a Causal Relationship Between an Employer's AAP and its Subsequent Adverse Employment Actions Taken Against Him 9

II. Review is Warranted Because there is a Conflict in the Circuits as to the Standards for Determining the Validity of an Affirmative Action Plan Utilized by a Private Sector Employer to Justify Racial Preferences for Minority Employees 14

III. Review is Warranted Because the Sixth Circuit has so far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Supervisory Power 18

Conclusion 19

Appendix

Appendix A - Sixth Circuit Order Denying Rehearing and Rehearing *En Banc* - May 28, 2004 . . . . . 1a

Appendix B - Sixth Circuit Opinion - March 10, 2004 . . . . . 2a

Appendix C - District Court Order - April 24, 2002 . . . . . 13a

Appendix D - Petition for Rehearing and Rehearing *En Banc* 44a

Appendix E - Excerpt from District Court Record Plaintiff's Memorandum Contra Defendant's Motion for Summary Judgment 60a

Appendix F - Excerpt Sixth Circuit Final Brief of Plaintiff-Appellant 64a

TABLE OF AUTHORITIES

Cases

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 6, 18, 19

Bass v. Board of County Commissioners, 256 F.3d 1095 (11th Cir. 2001) 9, 12

Brown v. McLean, 159 F.2d 898 (4th Cir. 1998) 9-10, 11

Cerrato v. San Francisco Community College District, 26 F.3d 968 (9th Cir. 1993) 10

Cunico v. Pueblo School District No. 60, 917 F.2d 431 (10th Cir. 1990) 10, 11, 16

Harding v. Gray, 9 F.3d 150 (D.C. Cir. 1993) 12

Johnson v. Transp. Agency, Santa Clara City, 480 U.S. 616 (1987) 14, 15, 18

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 5, 10

McGarry v. Board of County Commissioners of Pitkin, 175 F.3d 1193 (10th Cir. 1999) 9

McQuillen v. Wisconsin Educational Association Council, 830 F.2d 659 (7th Cir.1987) 11-12

Messer v. Meno, 130 F.3d 130 (5th Cir. 1997) 12

Schurr v. Resorts International Hotel, Inc., 196 F.3d 486 (3d. Cir. 1999) 10, 11, 16

Setser v. Novack Investment Co., 657 F.2d 962 (8th Cir. 1981) 15

Steelworkers v. Weber, 443 U.S. 616 (1979) 14

Stock v. Universal Foods Corporation, 1994 U.S. App. LEXIS 771, 63 Fair Empl. Cases (BNA) 960 (4th Cir. 1994) 15

Taxman v. Board of Education of the Township of Piscataway, 521 U.S. 1117 (1997) . . . 10, 11, 16

Taxman v. Board of Education of the Township of Piscataway, 91 F.3d 1547 (3d Cir. 1996) 17

Texas Dept. Of Community Affairs v. Burdine, 450 U.S. 248 (1981) 10

Statutes and Rule

28 U.S.C. § 1254(1) 1

29 U.S.C. § 2000e et seq 1

42 U.S.C. § 2000e-2(a)(1) 1

S. Ct. Rule 10 6

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, dated May 28, 2004, denying Petitioner's Petition for Rehearing and Rehearing *En Banc* is reprinted at App. 1a. The unpublished March 10, 2004, Sixth Circuit panel opinion is reprinted at App. 2a -12a. The April 24, 2002 order of the United States District Court for the Southern District of Ohio, Western Division, is reprinted at App. 13a-43a.

STATEMENT OF JURISDICTION

The Sixth Circuit issued its decision denying Petitioner's Petition for Rehearing and Rehearing *En Banc* on May 28, 2004. This petition for certiorari is timely in that Petitioner has filed it within 90 days of May 28, 2004. This Court has jurisdiction pursuant to 28 U.S.C. Sec. 1254(l).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of Title VII of the Civil Rights Act of 1964 ("Title VII"), 29 U.S.C. Sec. 2000e et seq. Specifically, 42 U.S.C. Sec 2000e-2(a)(1) is the relevant statute involved in this Petition.

42 U.S.C. Sec. 2000e-2(a)(1) provides:

(a) Employer practices

It shall be an unlawful employment practice for an Employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any

> individual with respect to his compensation terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

STATEMENT OF THE CASE

I. Overview of the Case

The United States District Court for the Southern District of Ohio ("The District Court") granted Respondent's Motion for Summary Judgment. It held that Petitioner did not adduce direct evidence of reverse discrimination, noting that the existence of Respondent's affirmative action plan, coupled with other evidence that Respondent was engaging in other race-conscious efforts to increase minority representation in the workforce, did not constitute direct evidence of race discrimination. App. 37a-39a.

The Sixth Circuit panel affirmed the District Court's granting of summary judgment. It held that the existence of a valid affirmative action plan is irrelevant to the issue of direct evidence of reverse discrimination, and found that Respondent's mere denial that it acted according to the Plan was sufficient to overcome the import of company pronouncements that it intended to, and did, embark in proactive race-conscious hiring and promotion programs.

The Sixth Circuit denied Petitioners Petition for Rehearing and Rehearing *En Banc*, without giving any reasoning in support for its denial. App.1a.

II. Background of the Case

Petitioner Peter Hagan ("Hagan") was hired by Respondent Warner/Elektra/Atlantic Corp. ("WEA") as a sales representative in 1974. App.15a. Over the years, Hagan advanced steadily through the ranks until he was promoted to the position of Sales Manager of WEA's Cleveland, Ohio office in 1992. App. 15a. In 1995, WEA underwent a corporate reorganization, wherein WEA promoted a much younger and inexperienced African American employee Dale Hill ("Hill") to take over Hagan's job, and demoted Hagan to the subordinate role of Field Sales Manager whereby he would now report directly to Hill. App. 47a-48a. This was accomplished notwithstanding the fact that Hagan had performed very well in his current job, had received recognition for being a very effective sales manager, and had not received any adverse write-ups by his superiors. App. 52a.

In the next few years, Hill performed very poorly at his job. He was criticized for his dishonesty, crude language, harassment of employees, and laziness. App. 53a-54a. In 1999, the Cleveland office was shut down. Hill was offered a transfer to a vacant position in WEA's Philadelphia office, whereas the far more qualified Hagan was not. After Hill turned down the position, it was offered to another lesser qualified and experienced African-American employee, even though Hagan was more qualified for the job. App. 54a-56a. Another Philadelphia vacancy was offered to a similarly less qualified African-American employee instead of to the more qualified Hagan. App. 54a-56a Hagan then quit rather than accept a far lower paying non-management job with far less responsibility. App. 56a.

Prior to the operative events of this case, WEA maintained in place a lengthy Affirmative Action Plan to promote the hiring and promotion of African-American employees into management positions, so as to remedy the historic "under-utilization" (WEA's words) of African Americans in the past. App.46a. WEA's CEO had often gone on record as championing this cause, and favorably cited his concerted and successful efforts over the years to increase the numbers of minority individuals in the ranks of WEA management. App. 46a-47a. WEA's home office in California pressured and exhorted its branch managers throughout the country to track and report back their progress in increasing minority representation in their offices. App. 46a. Hagan's own supervisor in the Cleveland office often reported to WEA's home office his anxiety over his inability to achieve the desired results and his resolve to try harder. App. 46a. WEA and other record companies were also under intense public pressure from Jesse Jackson and the Rainbow Coalition to hire more minority individuals into management. App. 47a.

There has been no showing whatsoever of a court finding, either state or federal, that WEA has ever engaged in race discrimination. Nor has WEA been party to a Consent Decree mandating that it take positive steps to remedy past race discrimination. Nor is there any evidence that WEA in particular, or the recording industry in general, has ever engaged in illegal or invidious discrimination against African American employees or applicants. The Affirmative Action plan promulgated by WEA has no termination date.

III. Proceedings Below

Hagan filed this Title VII case alleging, *inter alia*, reverse race discrimination, both in his being replaced as Sales

Manager in 1995 by the lesser qualified and less experienced minority employee Hill, and later in 1999 in being passed over in favor of Hill and other less qualified and less experienced minority individuals for transfer to vacant management positions in Philadelphia for which he was qualified. Hagan cited to the District Court, and later to the Sixth Circuit, WEA's Affirmative Action Plan and the other subsequent remedial measures *supra* that taken pursuant thereto, as direct evidence of reverse race discrimination.

The District Court, in granting WEA summary judgment, held that the existence of the Affirmative Action Plan, even when coupled with the above-cited other race-conscious remedial actions undertaken by WEA to increase minority representation, did not constitute direct evidence of reverse race discrimination, "particularly where the employer has denied acting pursuant to the plan and there is no direct evidence to the contrary." App. 38a. (emphasis added).[1]

In affirming the District Court, the Sixth Circuit also found no direct evidence of reverse race discrimination. Like the District Court, the Sixth Circuit found the terms of the Affirmative Action Plan and Respondent's other remedial measures irrelevant to the issue of direct evidence of reverse

---

[1] The District Court also held that Hagan had failed to make out his case under the "indirect evidence" method, since he had failed to satisfy one of the extra prongs of the modified *McDonnell Douglas* prima facie test, i.e., that there existed background circumstances which would suggest that WEA was that unusual employer who discriminated against the majority. The District court refused to regard the Affirmative Action Plan and its subsequent race-conscious measures as indirect or circumstantial evidence of reverse race discrimination. App. 38a-40a.

race discrimination, absent evidence that WEA acted pursuant to the plan in taking the adverse actions against Hagan. App. 6a.[2]

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 sets out the various considerations to be used by this Court in determining whether to grant a petition for a writ of certiorari. One major consideration is whether a "United States court of appeals has entered a

---

[2] The Sixth Circuit, like the District Court, also rejected Hagan's attempt to make out his case on the basis of indirect evidence. However, unlike the District Court, the Sixth Circuit assumed for the sake of argument that Hagan met all of the prongs of the prima facie test, App. 7a, but further held that Hagan had failed to produce credible evidence that WEA's articulated reasons for demoting and later failing to transfer him were pretextual. App. 7a-12a. In so doing, the Sixth Circuit failed to regard the Affirmative Action Plan and the subsequent race-conscious remedial measures to constitute even circumstantial evidence of reverse race discrimination. The Sixth Circuit also chose to disregard the sizeable quantum of credible evidence calling into question WEA's nondiscriminatory reasons for taking its adverse actions against Hagan. App.50a-60a. Instead the Sixth Circuit fully credited WEA's version of the facts, in direct contravention of this Court's ruling in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,247-248 (1986) to the effect that a court must examine *de novo* all of the documentary and testimonial evidence in the record, drawing in the process all inferences from the underlying facts in a light most favorable to the non-moving party. The Sixth Circuit's failure to adhere to this long-established doctrine is fully discussed in Petitioner's Petition for Rehearing and Rehearing *En Banc* which is attached to this Petition as Appendix D.

decision in conflict with the decision of another United States court of appeals on the same important matter. . ." Another consideration is that "...a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." A third consideration is whether a circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. All of these considerations are present in this case.

The presence of Affirmative Action Plans ("AAP"s") and other race-conscious remedial measures, taken in conjunction with, or independent of, such AAP's, have become increasingly commonplace as large corporate employers strive to increase diversity in their workplaces and foster upward mobility of minority employees into higher levels of management. While these AAP's and supporting remedial measures are inherently worthwhile, and their aims laudable, federal courts have not given private employers *carte blanche* power to implement them. Rather, they have closely scrutinized such measures, and, on many occasions, have invalidated adverse employment actions taken in pursuit thereof when the result is unlawful discrimination against majority (invariably Caucasian) employees.

The Sixth Circuit concluded that Petitioner had failed in his attempt to establish that Respondent's AAP constituted direct evidence of reverse race discrimination. It noted that Petitioner was unable to demonstrate that Respondent had acted pursuant to its AAP when it took the at-issue adverse employment actions against him. In so doing, the Sixth Circuit refused to consider circumstantial evidence adduced by Petitioner that would tend to establish that Respondent was

so motivated to take these adverse employment actions. However, a number of United States courts of appeal in other circuits have in fact allowed reverse discrimination plaintiffs to use a wide variety of circumstantial evidence to establish the causal connection between an employer's AAP and subsequent adverse employment actions taken against them. There is thus a conflict in the circuits on this important evidentiary question that calls for resolution by this Court.

Secondly, should this Court take up this case based on the above considerations, it will then be squarely faced with the tandem issue of what factors lower courts should consider in determining the validity of AAP's relied upon by private sector employers as justification for undertaking employment measures that favor minority employees to the detriment of majority employees. There is a wide divergence among the circuits as to what these factors should be. This Court should grant Petitioners petition for the purpose of resolving this conflict.

Finally, the Sixth Circuit made a number of critical credibility resolutions and drew a number critical inferences in favor of the Respondent in affirming the District Courts granting of its Motion for Summary Judgement. In so doing, the Sixth Circuit's departure from well established law was sufficiently marked as to call for an exercise of this Court's supervisory power.

This Court's review is warranted for all of these reasons.

I. Review is Warranted Because the Decision of the Sixth Circuit is in Direct Conflict with the Decisions of the United States Court of Appeals in other Circuits as to How a Reverse Discrimination Plaintiff can Prove a Causal Relationship Between an Employer's AAP and its Subsequent Adverse Employment Actions Taken Against Him.

The District Court, conceding the existence of Respondent's AAP and other measures taken in furtherance thereof, refused to regard these undertakings as direct evidence of reverse race discrimination, largely because Respondent denied that it had acted pursuant to the AAP in first demoting and later denying a transfer to Petitioner. App. 38a. The Sixth Circuit, in affirming the District Court, adopted the same rationale. App. 6a. In so holding, it admitted that this was an issue hitherto never addressed in the Sixth Circuit. App. 6a.

However, other Circuits have dealt with the same issue and found that an AAP is evidence of reverse race discrimination. In *Bass v. Board of County Commissioners*, 256 F.3d 1095 (11th Cir. 2001), the Court held that the hiring of minority individuals in pursuit of goals of affirmative action plans, and policy statements made by hiring authorities in support of affirmative action objectives may constitute direct evidence of discrimination, *even if the employer denied having been so animated*, as long as there is other evidence that the employer acted pursuant to the stated AAP. *Id.* at 1110, n.7. *See also McGarry v. Board of County Commissioners of Pitkin*, 175 F.3d 1193, 1200 (10th Cir. 1999), where the court found there to be direct evidence of discrimination in light of the fact that the plaintiff had been passed over for promotion in favor of two minority employees due to their race. In *Brown v. McLean*, 159 F.2d 898, 904

(4th Cir. 1998), the Court held that the existence of an AAP constituted evidence, as long as the employers at-issue adverse actions were taken pursuant to the plan. *Accord Cerrato v. San Francisco Community College District*, 26 F.3d 968, 976 (9th Cir. 1993).

The existence of an AAP has also been found to be relevant in a reverse discrimination plaintiff's attempt to prove his case through indirect, as opposed to direct, evidence of discrimination. Once such a plaintiff has made out his *McDonnell-Douglas* prima facie case, and the employer has met its burden of articulating non-discriminatory business reasons for taking adverse action against him, the plaintiff then has the burden of showing that the employer's decision to take adverse action against him was pretextual. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248 (1981). A number of Courts of Appeal have looked upon AAP's and their race-conscious enabling measures as relevant to the question of whether a reverse discrimination plaintiff has succeeded in meeting this burden of establishing pretext. *Schurr v. Resorts International Hotel, Inc.*, 196 F.3d 486, 497-98 and n. 11 (3d. Cir. 1999). *Taxman v. Board of Education of the Township of Piscataway*, 91 F.3d 1547, 1556-57 (3d Cir. 1996); *Cunico v. Pueblo School District No. 60*, 917 F.2d 431, 436 (10th Cir. 1990).

The one common thread running through all of these cases is the requirement that the reverse discrimination plaintiff not only prove the existence of the AAP but also that the employer's adverse employment action against the plaintiff was taken pursuant to the AAP. The all-important question thus becomes what sort of evidence must a reverse race discrimination plaintiff adduce in order to demonstrate the causal connection between the AAP and the adverse

employment action? In many cases, such as *Schurr*, *Taxman*, and *Cunico*, *supra*, the question never arises since it is undisputed that the employer took action pursuant to its AAP. The employer even concedes as much. The analysis then proceeds to the next phase wherein the court must determine whether or not the AAP is valid. Far less clear is the question of how a reverse discrimination plaintiff proves this crucial causal connection when the employer claims that it has *not* acted pursuant to its AAP.

The Sixth Circuit in this case pointed to Respondent's denial that it had acted pursuant to its AAP and simply held that Petitioner had failed to establish any evidence establishing the causal connection between the AAP and his demotion and later layoff in lieu of lateral transfer. App. 6a. The Sixth Circuit offered no insight as to how a reverse discrimination plaintiff might establish such a connection. To be sure, Petitioner could offer no *direct* evidence of causation. He could not, and did not, adduce any evidence that the employer stated outright that it had promoted Hill to take the place of Petitioner Hagan in furtherance of its AAP. However, the open question remains as to whether a reverse race discrimination plaintiff like Petitioner might be able to prove causation through indirect or circumstantial evidence. A number of circuit courts have addressed this issue. In *Brown v. McLean supra*, the Court held that the existence of the employer's AAP coupled with the hiring of minorities was by itself insufficient circumstantial evidence to support a finding of a causal connection, at least at the summary judgement stage. *Brown* at 904.[3] *See also McQuillen v. Wisconsin*

---

[3] The Court, however, reserved judgment on whether such proof would be sufficient at trial. *Id.*

Educational Association Council, 830 F.2d 659, 666 (7th Cir.1987).

However, other circuits have been more receptive to a reverse race discrimination plaintiff's attempt to prove the existence of causation. In a case remarkably similar to the instant case, *Messer v. Meno*, 130 F.3d 130, 139 (5th Cir. 1997), the Court held that the employer's promulgation of an AAP, coupled with a steady stream of written and oral pronouncements from the employer voicing its support for increased workplace diversity and exhorting its managers to make personnel decisions consistent with this corporate mindset, created an issue of fact as to whether the plaintiff was the victim of reverse discrimination as a result of the AAP. Similarly, in *Bass v. Board of County Commissioners*, *supra* at 1110-1111, the Eleventh Circuit held that a reverse discrimination plaintiff could establish evidence of reverse race discrimination by demonstrating the existence of an AAP, coupled with the same type of circumstantial evidence present in *Messer*, even where the employer has denied acting pursuant to the plan. The same background circumstances relied upon by the courts in *Bass* and *Messer* are present in the instant case.

Another case that is instructive is *Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993). *Harding*, albeit, was not faced with the issue of an AAP. The employer had no such plan. However, at issue in *Harding* was how a reverse discrimination plaintiff might establish the existence of reverse discrimination through circumstantial evidence. The *Harding* court relied on the fact that (1) the reverse discrimination plaintiff had not been considered for promotion, (2) management never reviewed the qualifications of the minority employee to determine whether he was more qualified for promotion than a majority candidate, and (3) a

more qualified white applicant was denied promotion in favor of a minority applicant with lesser qualifications. *Id.* at 153-54. All of these facts are present in the instant case. If a plaintiff can make out a case of reverse discrimination based on these circumstances, as Petitioner Hagan has done here, he should, *a fortiori*, be able to do so when, coupled with these facts, he can also show that his employer had in place an AAP and inculcated in its managers an overarching desire to enhance workplace diversity through race-conscious personnel decisions.

In sum, it is self-evident that the decision of the Sixth Circuit, if allowed to stand, will provide little guidance to the lower federal courts as to what standards they should follow in determining how a reverse discrimination plaintiff can meet his burden of showing that his employer took adverse actions against him in furtherance of the goals set out by the employer's AAP. At minimum, the Sixth Circuit's decision in this case is at odds with the decisions of several other circuit courts addressing the same issue.

Therefore, this Court's review is warranted so as to harmonize these decisions and provide guidance to lower courts on the appropriate standards they should follow in making determinations as to how a reverse discrimination plaintiff can prove a causal connection between his employer's AAP and the subsequent adverse actions taken against him.

II. Review is Warranted Because there is a Conflict in the Circuits as to the Standards for Determining the Validity of an Affirmative Action Plan Utilized by a Private Sector Employer to Justify Racial Preferences for Minority Employees.

If a reverse discrimination plaintiff can demonstrate a causal connection between the AAP and his adverse treatment, the case moves to the next stage of analysis, where the validity, or permissibility of the AAP becomes the dispositive issue. If the AAP is valid, it is permissible for a private sector employer to engage in race-conscious personnel measures to increase minority representation in its workforce or management ranks. If, on the other hand, the AAP is deemed invalid, any such race-conscious measures are struck down as unlawful reverse race discrimination.

The Supreme Court first addressed the issues of AAP's in the private sector about 25 years ago in *United Steelworkers v. Weber*, 443 U.S. 193 (1979). The Court ruled that such a plan was permissible where (1) it was intended to remedy a past practice of racial discrimination, (2) the AAP did not "unnecessarily trammel" the interests of white employees by requiring their discharge and replacing them with minority employees and (3) the AAP was a temporary measure. *Id.* at 208. This Court again addressed this issue eight years later in *Johnson v. Transp. Agency, Santa Clara City*, 480 U.S. 616 (1987). In *Johnson*, the Court refined Prong One of the *Weber* test by holding that an AAP is permissible so long as the employer can somehow demonstrate "a manifest imbalance" that reflected an under-representation of protected class members in traditionally segregated job categories. *Id.* at 631. The Court went so far as to say that the "manifest imbalance" need not rise to such a level of a prima facie case

of Title VII discrimination by the employer for the AAP to be found permissible. *Id.*

The task of determining the parameters of what constitutes a "manifest imbalance" or "unnecessarily trammeling" has been taken up by the various circuit courts in the several years after *Weber* and *Johnson*. And the last 17 years has witnessed a significant number of circuit court decisions which have created widely differing, and often conflicting standards for gauging the permissibility of AAP's.

Some courts are more lenient toward employers who offer up their AAP's as a justification for reverse discrimination. In *Setser v. Novack Investment Co.*, 657 F.2d 962 (8th Cir. 1981), the Court was "reluctant to discourage experimentation by employers in remedying past discrimination." *Id.* at 970. If the AAP "has a reasonable purpose and reasonable goals", the Plan is permissible. *Id.* The Court did not, however, offer any guidance as to what constituted "past discrimination". Nor did it define "reasonable". That was left up to the employer, who could interpret these terms as it wished. In *Stock v. Universal Foods Corporation*, 1994 U.S. App. LEXIS 771, 63 Fair Empl. Cases (BNA) 960 (4th Cir. 1994), the Court held that all the employer had to do to establish the permissibility of its AAP was to simply declare that it had historically discriminated against members of a protected class (here women), and that women were underutilized in craft positions. *Id* at *8. The Court also noted the presence of a negative audit by the Equal Employment Opportunity Commission (EEOC). *Id.*

The courts of other circuits have imposed a more onerous burden on employers, and have struck down AAP's that are not tailored to remedy past discrimination, or that unnecessarily trammel the interests of majority employees.

For instance, the Third Circuit, in *Taxman v. Board of Education of the Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996), struck down an AAP since it was promulgated not to remedy actual prior discriminatory employment practices, but only to promote a more diverse workforce. *Id.* at 1558-1560. Similarly, in *Cunico v. Pueblo School District No. 60*, 917 F.2d 431 (10th Cir. 1990), the Tenth Circuit invalidated the employer's AAP because it was unable to cite any *direct evidence* of past discriminatory conduct. *Id.* at 438. The most the employer was able to demonstrate in *Cunico* was that the AAP helped to increase minority representation in the ranks of management, which had historically been bereft of a significant number of minority individuals. However, the Court noted that this historical under-representation was due more to the lack of minority employees in the work force in general than any prior invidious acts of discrimination by the employer. *Id.* at 438-440.[4] *Taxman* at 1564. *See also Schurr v. Resorts International Hotel*, 196 F.3d 486, 496-98 (3d Cir. 1999). The Court in *Cunico* also noted that the AAP unnecessarily trammeled the interests of majority employees in that the at-issue job slot was earmarked for a minority individual only. *Id.* at 440.

The issue of the permissibility of Respondent's AAP was contested by Petitioner Hagan both in his brief to the District Court in opposition to Respondent's Motions for Summary Judgment, App. 60a-63a, and his appellate brief to the Sixth Circuit, App. 64a-65a. He pointed to the uncontroverted fact that Respondent's AAP was promulgated not to remedy actual prior discriminatory conduct, but rather to remedy a self-perceived "under-utilization" of minority individuals in

---

[4] *Cunico* was cited favorably by the Third Circuit in *Taxman*.

the company and to increase diversity within its managerial staff. He also noted that the AAP had no end date. The Sixth Circuit never addressed the issue of the validity of AAP's because, as noted earlier, it had already found, in a very cursory sort of way, no evidence in the record that Respondent's AAP played a role whatsoever in the adverse employment actions it took against Petitioner. This question is, nonetheless, ripe for review by this Court. Petitioner has already argued *supra* why it is important for this Court to review the Sixth Circuit's refusal to find such a causal connection, given the split amongst the circuits as to how such a causal connection may be proven.

Should this Court take the opportunity to clarify the law on this point, it should also take the opportunity to resolve split amongst the circuits as to the companion issue, i.e. the criteria upon which lower courts should rely in deciding the permissibility or impermissibility of AAP's. In fact, this Court has already made a determination to review the question. In *Taxman v. Board of Education of the Township of Piscataway*, 521 U.S. 1117 (1997), granted Petitioner's petition for a writ of certiorari. However, the petition was later denied as moot after the parties to the litigation settled the case. Petitioner Hagan now presents the very same issue for review. Therefore, this Court should, for the same reasons it did in *Taxman*, grant Petitioner's petition for writ of certiorari in this case.

Revisiting the test for balancing the commendable interest of employers who seek to increase the diversity of their workplaces with the equally genuine interest of majority employees in being protected from invidious reverse discrimination is a very crucial, and long overdue, task for this Court. This is especially the case in today's modern environment where thousands of middle-to-large employers

have promulgated AAP's, either for altruistic reasons, or in order to qualify to bid for goods and services contracts with federal, state or local agencies. This Court has not addressed the issue of racial preferences in the private sector since *Weber* and *Johnson* were decided over 17 years ago. The tandem issues of how to establish whether an employer is acting in accordance with its AAP's and how to establish whether or not the AAPs are valid have in the meantime percolated throughout the various circuits. The circuit court decisions have been anything but uniform, thereby depriving countless employers and employees, as well as the attorneys who represent them, of the guidance they need to fulfill their rights and obligations. Therefore, this Court should grant Petitioner's petition for certiorari and review the decision of the Sixth Circuit so as to clarify the law in this area.

III. Review is Warranted Because the Sixth Circuit has so far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Supervisory Power.

Altogether independent of the other grounds under which Petitioner Hagan seeks this Court's review is the method by which the Sixth Circuit accorded weight to the evidence and drew inferences in this case. It has long been well-settled law that at the summary judgment stage of a case, when a United States court of appeals considers whether the non-moving party has established the existence of a genuine issue of material fact, it must examine *de novo* all of the documentary and testimonial evidence in the record, drawing in the process all inferences from the underlying facts in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). However, for each opportunity the Sixth Circuit had in this case to address and resolve a material issue of fact, it either altogether

ignored the evidence adduced by plaintiff, or resolved all credibility disputes in favor of Respondent, and further drew all inferences in a light most favorable to Respondent. Petitioner shall not dwell on the each instance where the Sixth Circuit failed to follow the prevailing law, but shall merely direct this Court to Petitioners Petition for Rehearing and Rehearing *En Banc*, which has been included as an appendix to this Petition. App. 44a-59a. Therefore, this Court should except review of the Sixth Circuit's decision so as to exercise its supervisory power, and thereby remand the case to the Sixth Circuit to re-analyze the facts of this case in accordance with the guidelines set forth in *Anderson v. Liberty Lobby, Inc.*

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the Petition.

Respectfully Submitted,

Donald B. Hordes
Counsel of Record
Schwartz, Manes & Ruby
2900 Carew Tower
441 Vine Street
Cincinnati, OH 45202-3090
(513) 579-1414

Counsel for Petitioner
Peter M. Hagan

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 02-3602

[Filed May 28, 2004]

PETER M. HAGAN,
Plaintiff-Appellant,

v.

WARNER/ELEKTRA/ATLANTIC CORPORATION,
Defendant-Appellee.

On Appeal From
The United States District Court
for the Southern District of Ohio
00-00412, Weber 04-24-02

Before: Nelson, Clay, and Cook, Circuit Judges

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

on the suggestion for rehearing en banc, the petition for rehearing had been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 02-3602

[Filed March 10, 2004]

PETER M. HAGAN,
Plaintiff-Appellant,

v.

WARNER/ELEKTRA/ATLANTIC CORPORATION,
Defendant-Appellee.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
00-00412
Weber 04-24-02

Before: NELSON, CLAY, and COOK, Circuit Judges.

OPINION

COOK, Circuit Judge. Peter M. Hagan challenges the district court's grant of summary judgment to his former employer, Warner/Elektra/Atlantic Corporation ("WEA"), on his reverse race, reverse gender, and age discrimination claims. Hagan alleges that discrimination motivated WEA's decision to demote him in 1995 and then to deny him a transfer in 1999. Because Hagan adduced neither direct evidence of discrimination nor evidence that WEA's proffered nondiscriminatory reasons were pretextual. we affirm the district court's judgment.

I

In the early 1990s, Hagan worked as Branch Sales Manager of the Cleveland branch of WEA, a music distribution company. His position ranked second to Branch Manager Richard Froio. In 1995, WEA downgraded the Cleveland office from a branch office to a district office and changed its personnel and management structure. Though Hagan remained second in charge of the Cleveland office, his title changed from Branch Sales Manager to Field Sales Manager. And because Froio left WEA altogether, the top position in the Cleveland office–District Sales Manager–became available.

To fill the District Sales Manager vacancy, WEA hired Dale Hill, an African-American sixteen years younger than Hagan, a Caucasian male, presently fifty-seven years old. Although Hagan now complains about WEA's selection of Hill over him. he served as Field Sales Manager without challenging that management decision until WEA closed its Cleveland office some four years later.

Due to the closing, most employees were not offered an opportunity to transfer to another WEA location and instead lost their jobs. WEA did, however, offer to transfer Hagan. In fact, WEA offered Hagan three options: a sales representative position in another office, a consulting arrangement, or a severance package. Hagan rejected all three options and instead filed suit against WEA, alleging violations of the Age Discrimination in Employment Act. Title VII of the Civil Rights Act, and the Ohio Revised Code. *See* 29 U.S.C. § 621 *et seq.;* 42 U.S.C. § 2000e *et seq.;* O.R.C. §§ 4112.02 and 4112.99.

With his complaint, Hagan charges that unlawful discrimination prompted WEA to "demote" him in 1995. He also claims that impermissible discrimination precipitated WEA's failure to offer him one of three positions in other offices that were available when the Cleveland office closed in 1999. According to Hagan. WEA should have transferred him into a vacant Field Sales Manager position in Philadelphia. WEA instead offered that position first to Hill and then to Jeanne White, an African-American female who, like Hill, was younger than Hagan. Finally, Hagan complains that unlawful discrimination motivated WEA's refusal to offer him the position of Field Sales Manager of Black Music either in Philadelphia or in Detroit. Instead, WEA selected younger African-American women.

Finding that Hagan presented no direct or circumstantial evidence of discrimination, the district court granted WEA summary judgment on all claims.

II

Standard of Review

Summary judgment is proper if we conclude, after reviewing de novo the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" and drawing all inferences from the underlying facts in the light most favorable to the non-moving party, that "there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Direct Evidence of Discrimination

For Hagan to survive summary judgment on his employment discrimination claims, he must have either "presented direct evidence of discrimination or introduced circumstantial evidence that would allow an inference of discriminatory treatment." *Carter v. Univ. of Toledo,* 349 F.3d 269, 272 (6th Cir. 2003) (internal quotation marks and citation omitted). Direct evidence "is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Weberg v. Franks,* 229 F.3d 514, 522 (6th Cir. 2000) (internal quotation marks and citation omitted). If Hagan offers direct evidence of discrimination, the burden shifts to WEA to come forward with evidence showing it would have taken the same actions absent the discriminatory motive. *Id.* (citations omitted).

Hagan does not claim that he can support his age or gender discrimination allegations with direct evidence; rather, he contends that WEA's affirmative action plan and related

documents are direct evidence from which a reasonable jury could infer race discrimination. Although we have found no circuit precedent on point, our sister circuits recognize the existence of an affirmative action plan to be irrelevant to proving discrimination unless the employer acted discriminatorily pursuant to the plan. *See, e.g., Bass v. Bd. of County Comm'rs. Orange County, Fla.*, 256 F.3d 1095, 1110 (11th Cir. 2001) ("The existence of an affirmative action plan, when combined with evidence that the plan was followed in an employment decision, is sufficient to constitute direct evidence of unlawful discrimination unless the plan is valid."); *Cerrato v. San Francisco Cmty. Coll. Dist.*, 26 F.3d 968, 976 (9th Cir. 1994) ("Other circuits have held–and common sense tells us–that the mere fact of an affirmative action plan's existence is not relevant to proving discrimination unless the employer acted pursuant to the plan."). Hagan offers no evidence establishing a causal connection between the plan and his "demotion," but merely argues that a genuine issue of material fact exists because the parties disagree as to the reason for WEA's actions. Hagan's unsupported statement that such evidence exists fails to create a genuine issue of material fact.

We thus agree with the district court's conclusion that Hagan fails to stave off summary judgment with direct evidence of discrimination.

Circumstantial Evidence of Discrimination

Hagan next contends that the district court erred by concluding that he failed to present circumstantial evidence of discrimination. We analyze these claims under the familiar *McDonnell Douglas/Burdine* burden-shifting framework. *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992)

(applying the analysis to claims brought under Title VII, the ADEA, and Ohio law).

1995 Claims

Hagan's claim that he suffered a materially adverse employment action in 1995 upon his "demotion" from Branch Sales Manager to Field Sales Manager–an element of a prima facie case of discrimination–falters because his salary and benefits went unaltered. His proffered evidence shows only a minor change in status and responsibility; he remained second in command of the Cleveland office after its downgrade to a district office. We need not decide whether the district court erred in concluding that Hagan failed to establish a prima facie case of discrimination because even with a prima facie case showing, summary judgment would nevertheless still be appropriate as Hagan cannot rebut WEA's non-discriminatory reasons for "demoting" him.

According to WEA, Schone, the person charged with filling the District Sales Manager position, did not select Hagan to head the Cleveland office because: (1) Hagan did not express real interest in running the Cleveland office; (2) the person in charge of purchasing at Camelot. WEA's largest Cleveland customer (accounting for more than 75% of WEA's business in Cleveland), asked that Hagan not head the Cleveland office; (3) the former head of the Cleveland office. Froio, had worked closely with Hagan and counseled Schone against it; and (4) Schone considered Hagan to be an ineffective leader because of his poor management of subordinates, his inadequacy in dealing with routine personnel issues, and his poor judgment (for example, Hagan dressed as Adolf Hitler at a WEA event and behaved inappropriately while drunk at WEA customer functions).

Hagan argues that the district court should not have considered WEA's fourth reason–Schone's reservations as to Hagan's ability to head the Cleveland office–because it is inadmissible hearsay evidence. Although Hagan correctly argues courts may not consider hearsay evidence on summary judgment, the district court properly considered Schone's testimony because Schone did not offer Hagan's coworkers' observations to prove the truth of the matter asserted, but for their effect on Schone, the listener. *United States v. Horton*, 847 F.2d 313, 324 (6th Cir. 1988).

Our review of WEA's proffered reasons convinces us that WEA satisfied its burden by offering legitimate, plausible reasons for Schone's decision to select someone other than Hagan as senior manager of the Cleveland office. *Chappell v. GTE Prods. Corp.*, 803 F.2d 261, 266 (6th Cir. 1986) (A "defendant need not persuade the [trier of fact] that it was actually motivated by the proffered reasons, but need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." (internal quotation marks and citations omitted)).

The burden then shifts to Hagan to show by a preponderance of the evidence that WEA's preferred reasons were pretextual: "(1) by showing the reasons had no basis in fact. (2) if they have a basis in fact, by showing that they were not the actual factors motivating the [demotion], or (3) if they were factors, by showing that they were jointly insufficient to motivate the [demotion]." *Chappell*, 803 F.2d at 266.

Hagan first argues that WEA's proferred reasons have no basis in fact because he would have been a good choice to head the district office. He insists that an absence of

disciplinary write-ups and a lack of criticism of his leadership skills by his subordinates suffices to show WEA's reasons have no basis in fact. Hagan highlights the opinion of Froio, who, unlike Schone, actually observed Hagan's work, and who, according to Hagan, "expressed no reservation about Pete Hagan as Sales Manager, and in fact, had said that he was very comfortable with Pete Hagan, in this role."

Although Hagan may indeed have been a good choice to head the Cleveland office, our inquiry focuses only on whether Schone's *belief* that Hagan would not be a good choice had a basis in fact. The record on summary judgment confirms the foundation of Schone's belief. Hagan does not dispute that Camelot contacted WEA management, including Schone, with concerns about Hagan heading the Cleveland office. Nor does he dispute that Schone knew about his dressing as a Nazi at a WEA event and behaving inappropriately while drunk in front of customers. Moreover, even Hagan's former boss, Froio, told Schone that he thought Hagan had weak personal skills. Because any or all of these facts could have been the basis of Schone's decision. Hagan's argument that Schone's decision had no basis in fact must fail.

Hagan next contends that WEA's proferred reasons did not actually motivate his "demotion." Lacking evidence to support this contention, Hagan offers only speculation that he was "demoted" so that an African-American could head the Cleveland office. We find speculation insufficient to establish pretext.

We conclude that because Hagan presented no evidence to rebut WEA's legitimate reasons for the actions taken in 1995, he is unable to establish a jury issue about whether these reasons were merely a pretext for discrimination.

Accordingly, we find that the district court properly granted summary judgment to WEA on his 1995 claims.

1999 Claims

Hagan contends that when WEA closed its Cleveland office in 1999, it should have considered him for both Field Sales Manager and Field Sales Manager of Black Music in Philadelphia. WEA first offered the Field Sales Manager position to Hill, who declined it. WEA then filled the position with Jeanne White, a young, African-American female who had been the long-time Field Sales Manager of Black Music in Philadelphia. WEA in turn hired Mary Ressner, also a young African-American female, to take White's previous position.

As a general rule, an employer who reduces its force for economic reasons need not transfer employees to other positions within the company. *Godfredson v. Hess & Clark, Inc.*, 173 F.3d 365, 374 (6th Cir. 1999). But when an employer chooses to transfer some displaced employees, it may not impermissibly discriminate in deciding whom to transfer. *Scott v. Goodyear Tire & Rubber Co.*, 160 F.3d 1121, 1126 (6th Cir. 1998). We have held that plaintiffs claiming that their employer unlawfully discriminated against them by failing to transfer them as part of a reduction in force must proffer "additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out [the plaintiffs] for discharge for impermissible reasons." *Barnes v. GenCorp Inc.*, 896 F.2d 1457, 1465 (6th Cir. 1990).

Even if Hagan did proffer such evidence, this claim would ultimately fail because he presents no evidence to rebut WEA's legitimate reasons for its transfers. Raymond Milanese, the person charged with filling the Philadelphia

managerial position, was personally familiar with Hill's but not Hagan's managerial abilities, as even Hagan concedes. Milanese's subjective evaluation of Hill's abilities serves as a legitimate, non-discriminatory reason for selecting Hill over Hagan for the transfer. *See Lerma v. Bolger*. 689 F.2d 589, 592 (6th Cir. 1982)

Hagan attempts to discount this proferred reason by speculating that if WEA had not brought Hill to manage the Cleveland office in 1995, then Hagan would have had the necessary relationship for Milanese to have selected him for the transfer. Such speculation has no relevance to the issue–Milanese's legitimate business reason for selecting the employee whose abilities he knew better.

And as far as the position of Field Sales Manager of Black Music is concerned. Hagan admitted the position required an intimate knowledge of black music and an ability to keep up with its quickly changing trends, and he himself did not like, understand, or follow today's black music. This factor, coupled with Hagan's having declined a sales job paying more than the Philadelphia job paid leaves Hagan without a basis for contending that WEA's failure to offer him the Field Sales Manager job constituted illegal racial discrimination.

Likewise, Hagan's argument that discriminatory motives led the company to deny him a transfer to Detroit lacks evidentiary support. WEA proffered its reason for failing to transfer him to serve as Detroit Field Sales Manager of Black Music–the position was never open. Patti Fullard held the position in the Cleveland office and continued to hold the same job serving the same clients when WEA transferred the job to the Detroit office. Because an employer has no duty to displace other employees in favor of an individual whose position has been eliminated by a reduction in force. WEA

articulated a legitimate business reason for not offering Hagan this position. *Sahadi v. Reynolds Chem.*, 636 F.2d 1116, 1118 (6th Cir. 1980).

Hagan counters that this reason lacks basis in fact because WEA had a policy or practice of allowing senior employees to "bump down" into lower paying junior positions that should have allowed him to bump down Fullard and assume her position. Yet Hagan offers as evidence of this policy only his own unsupported claim that three employees had "bumped" junior employees from their jobs, and the affidavit of one of those employees averring that. "This type of bumping is commonplace during times of downsizing." Schone, Froio, and Milanese denied knowledge of a practice or policy of bumping. Hagan's evidence does not show a clear policy of "bumping" existed, much less an impermissible denial in Hagan's case. Because WEA's proffered reason for failing to transfer Hagan to Detroit stands unrebutted. because Hagan was no more qualified to be Field Sales Manager of Black Music in Detroit than in Philadelphia, and because he was offered a higher paying sales job anyway, we assess no error by the district court on this claim either.

III.

Contrary to Hagan's assertions, there is no basis on which to overturn the district court's entry of summary judgment in favor of WEA. Accordingly, we affirm the judgment of the district court.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1- 00-412

[Filed April 24, 2002]

PETER M. HAGAN, Plaintiff,	)
v.	)
WARNER/ELEKTRA/ ATLANTIC CORP., Defendant.	)

ORDER

This matter is before the Court upon defendant's motion for summary judgment (doc. 22), plaintiff's opposing memorandum (doc. 24), plaintiff's highlighted copy of defendant's proposed findings of fact and conclusions of law (doc. 27), and defendant's reply in support of its motion (doc. 30).

I. Procedural history

Plaintiff, who at all material times was a resident of the State of Ohio, brings this action against defendant Warner/Elektra/Atlantic Corp. (WEA), a New York corporation. Plaintiff brings claims for age discrimination under the Age Discrimination in Employment Act (ADEA) and O.R.C. §§ 4112.02 and 4112.99, claims for race discrimination under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq., and O.R.C. §§ 4112.02 and 4112.99, claims for sex discrimination under Title VII and O.R.C. §§ 4112.02 and 4112.99, and a claim for violation of Ohio public policy. The claims arise out of plaintiff's alleged demotion in 1995 to the position of Field Sales Manger for defendant's Cleveland, Ohio office and from defendant's failure to offer plaintiff a position as Field Sales Manager or Field Sales Manager/Black Music in Philadelphia or Detroit following the elimination of plaintiff's position as part of the closure of defendant's Cleveland office in 1999. Plaintiff seeks reinstatement to the position of Sales Manager, back pay
and front pay and bonuses, compensatory and punitive damages, and attorneys fees.

II. Undisputed facts

The parties do not dispute the following facts:

1. Plaintiff is a white male who was 54 years old at the time he filed the complaint on May 23, 2000.

2. Defendant WEA is a music distribution company which at all relevant times engaged in the sale and distribution of phonograph records, audio cassette tapes, and compact disks out of a facility in Cleveland, Ohio, to various

wholesalers and retail outlets throughout the Midwest. WEA is ultimately a sales business.

3. WEA's operations are divided into different branches, each of which is responsible for a different geographic region of the country. Each branch office is headed by a Branch Manager, who is responsible for that branch office and the sales territories within the geographic limits of the branch. The branch offices are engaged not only in sales but in all aspects of WEA's operations, such as processing orders, billing, and the actual shipping of CDs and tapes. Each WEA branch has a number of smaller offices known as district sales offices which focus on sales. At a branch office, the day-to-day maintenance and operation of the office are the responsibility of the Branch Manager. The Sales Manager in a branch office concentrates solely on sales.

4. Both branch offices and district sales offices have other management-level sales personnel known as Field Sales Managers. Some Field Sales Managers focus on a single genre of music, such as Field Sales Manager of Country Music or Field Sales Manager of Black Music, while other Field Sales Managers are not so specialized. All Field Sales Managers report to a District Sales Manager or Branch Sales Manager.

5. Plaintiff began his employment with WEA as a Sales Representative in WEA's Cincinnati office in 1974. In 1986, plaintiff moved from Cincinnati to Cleveland to become the Field Sales Manager of the Cleveland Branch. In 1989, plaintiff became the Cleveland Branch Sales Manager. Plaintiff served in that capacity under Cleveland Branch Manager Freddie Katz until January of 1992 and under Branch Manager Rick Froio from 1992 until 1995.

6. The 1990s brought dramatic changes to the music industry. A number of WEA's major customers declared bankruptcy, consolidated, and/or merged. At the beginning of 1995, Froio announced his decision to leave the Cleveland Branch. As a result of the shrinking customer base and Froio's departure, WEA decided to downgrade the Cleveland office from a branch office to a district sales office in the spring of 1995. The Cleveland office then became a part of the Chicago branch headed by Denny Schone and plaintiff was made Field Sales Manager of the Cleveland office. As Field Sales Manager, plaintiff was the number two person in the Cleveland office. His pay and benefits were not affected by the office downgrade.

7. Dale Hill, an African-American, became District Sales Manager of the Cleveland office in June of 1995. He held the top position in the office.

8. Early in 1998, authority over the Cleveland district sales office was transferred from the Chicago branch to the Philadelphia branch in an effort to equalize workloads among the Branch Managers. Ray Milanese, Philadelphia's Branch Manager, became Hill's boss.

9. In May 1999, WEA shut down its Cleveland office because Camelot, its key customer which had accounted for at least 75% of WEA's sales, ceased its Ohio operations. Plaintiff understood the logic of closing the Cleveland office. As a result of the closing, the great majority of WEA's Cleveland employees lost their jobs without any offer of continued employment. A few select employees, including plaintiff, were offered the opportunity to remain employed with WEA.

10. Plaintiff was offered three different options when the Cleveland office closed. Those options were (1) accept a Sales Representative position with a salary of $64,000 per year, (2) enter into an 18-month consulting agreement requiring no more than 10 hours of work per month at a monthly salary of $4,011.00, or (3) accept an enhanced severance package worth $76,200.99. Plaintiff rejected all three options.

11. Plaintiff was not considered for any additional positions when the Cleveland office closed. He alleges that he should have been offered three other positions, which were (1) Patti Fullard's position as Field Sales Manager of Black Music; (2) Field Sales Manager in Philadelphia; and (3) Field Sales Manager of Black Music in Philadelphia.

12. As of 1999, Fullard had worked, as Field Sales Manager of Black Music for approximately ten years. She had been based in Cleveland but served both the Cleveland sales territory and portions of the Chicago territory, including Detroit. After the Cleveland office was closed, Fullard continued in her same job but was based out of a different office. Plaintiff admits that Fullard did a good job as Field Sales Manager of Black Music. Unlike Fullard, plaintiff did not like, did not understand, and did not follow "today's black music".

13. In the spring of 1999, Milanese had an opening for Field Sales Manager in Philadelphia. The opening existed because Milanese had promoted his Field Sales Manager, Sue Costello, to the position of Branch Sales Manager in December of 1998. When the Philadelphia Field Sales Manager position opened, Milanese first offered the position to Dale Hill, who declined the offer, and then

filled the position with Jeanne White, the long-time Philadelphia Field Sales manager of Black Music. Milanese never considered plaintiff for the position of Philadelphia Field Sales Manager.

14. As Branch Sales Manager, Costello selected Mary Ressner, a Sales Representative in the Philadelphia office, to fill the Field Sales Manager of Black Music position vacated by White.

15. Although plaintiff learned in the spring of 1995 that he was not going to become the District Sales Manager in the Cleveland office, he did not file an EEOC charge until October 19, 1999, over four years after the alleged discriminatory decision. He then amended his charge and claimed that he should have been made a Field Sales Manager of Black Music in either Detroit or Philadelphia.

III. Motion for summary judgment

Defendant moves for summary judgment on the ground that plaintiff has no evidence to establish a prima facie case of discrimination on the basis of race, sex or age. Defendant contends that plaintiff's race and sex discrimination claims must fail because he cannot demonstrate that WEA is "that unusual employer that discriminates against the majority," i.e., white, middle-aged men. Defendant notes that a majority of WEA's management staff are themselves white, middle-aged men. Defendant contends that the fact that the individual who decided against plaintiff for a position in 1995 was in the protected group for age discrimination and was only two years younger than plaintiff is significant evidence weighing against a finding of discrimination. Defendant asserts that plaintiff's attempt to establish a prima facie case of race discrimination fails on the additional ground that plaintiff has

offered no evidence that similarly-situated black employees received more favorable treatment. Defendant also contends that it is entitled to summary judgment because even assuming plaintiff has evidence to support a prima facie case, he has no evidence of pretext.

A. Motion for summary judgment on claims based on the 1995 employment action

Defendant argues that in addition, to being unable to establish that it is that unusual employer who discriminates against the majority and that plaintiff was treated less favorably than similarly-situated black employees, plaintiff cannot establish the prima facie element of a materially adverse employment action with respect to the 1995 employment action. Defendant asserts that plaintiff did not suffer a loss of salary or benefits, his job responsibilities did not significantly change, and plaintiff remained the number two person in the Cleveland office.

Defendant contends that even if plaintiff were able to establish a prima facie case, he cannot show that WEA's legitimate, nondiscriminatory reasons are pretextual. With respect to the 1995 decision and plaintiff's claims of race and age discrimination based thereon, defendant alleges that Denny Schone wanted the Cleveland District Sales Manager to be a strong leader with good people skills and to not be objectionable to Camelot, the key customer, whereas the top purchasing official at Camelot had repeatedly requested of Schone and others that plaintiff not be put in charge of the Cleveland territory; Camelot's negative reaction to plaintiff reinforced Schone's belief that plaintiff was not sufficiently active with customers and generally not adequately involved in the day-in and day-out sales and marketing functions of his position to take over the Cleveland office; and Schone

questioned plaintiff's leadership and judgment, especially in light of the fact that plaintiff had dressed up as a Nazi in front of customers and WEA employees and had performed drunken antics before customers.

Defendant also asserts that plaintiff's claims based on the 1995 decision are time-barred because plaintiff did not file an EEOC charge until October, 1999.

B. Motion for summary judgment on claims based on the closing of the Cleveland office

Defendant alleges that plaintiff cannot establish a prima facie case of age, sex or race discrimination with respect to the 1999 closing of the Cleveland office. Defendant asserts that plaintiff cannot show a materially adverse employment action because he was offered options for continued employment. Defendant notes that the salary for the Sales Representative position offered to plaintiff was larger than any of the salaries paid to those individuals transferred to the positions which plaintiff contends he should have been offered. Furthermore, defendant claims that plaintiff was not qualified for Fullard's position and was not similarly situated in all respects to Fullard and that defendant was under no duty to displace Fullard, who continued in her same job but was based out of a different office. Defendant also contends that it did not discriminate against plaintiff by not offering him the opportunity to transfer to the Field Sales Manager position in Philadelphia. Defendant asserts that plaintiff failed to express specific interest in the position; the key factor in Milanese's selection of the Manager was a close working relationship with Milanese, which plaintiff implicitly concedes and which plaintiff lacked; and plaintiff has not presented any credible evidence of the qualifications, experience or job performance

of the individual ultimately selected for that position, i.e., White.

In addition, defendant asserts that plaintiff was not qualified for and was never considered for the Field Sales Manager of Black Music position received by Mary Ressner because the decision maker, Costello, did not know that plaintiff had any interest in the position and plaintiff was not qualified for the position because he did not understand and did not follow "today's black music". Also, defendant states that plaintiff has not presented any evidence regarding Ressner's qualifications.

IV. Plaintiff's response

A. Evidence of reverse race discrimination

Plaintiff suggests that there is direct evidence of reverse race discrimination in the form of WEA's Affirmative Action Plan, which goes beyond a general well-intentioned purpose of seeking out qualified black applicants, advancing qualified minorities into open management positions, or offering extra training and education to upwardly mobile black employees, and establishes a goal to aggressively strive to increase the number of minorities at WEA. Plaintiff alleges that the existence of an affirmative action plan, together with evidence that the plan was followed in an employment decision, constitutes direct evidence of unlawful discrimination unless the plan is valid. Plaintiff alleges that the WEA Affirmative Action Plan is not valid because it does not set specific dates for its fulfillment; there is no evidence that WEA's Affirmative Action Plans were promulgated in the face of an actual court finding of discrimination or as part of a consent decree; and an employer cannot rely on an Affirmative Action Plan as a defense to reverse race discrimination when its

personnel decisions at issue were not taken pursuant to that plan. Plaintiff concedes that WEA does not cite its Affirmative Action Plan as the basis for its 1995 decision, but plaintiff claims that he has adduced other circumstantial evidence on which a jury could rely to find that defendant was motivated by its illegal Affirmative Action Plan. Plaintiff submits that there is a factual dispute that the jury must resolve as to whether defendant acted pursuant to its plan. Plaintiff asserts in support of his "direct evidence" argument that there is a substantial amount of circumstantial evidence clearly suggesting that defendant was motivated by pure racial considerations when it promoted Dale Hill to take plaintiff's position. Plaintiff therefore argues that the question of whether there is direct evidence of reverse racial discrimination should go to the jury.

Plaintiff also contends that he has adduced sufficient evidence from which a jury could conclude that he has met his prima facie case for both the 1995 and 1999 employment actions. As "background circumstances" which purportedly indicate that WEA is that kind of employer who discriminates against the majority, plaintiff points to WEA's adherence to its allegedly invalid 1997 Affirmative Action Plan; statements by the President of an independent distribution arm of WEA's parent company published in a magazine in 1995 stating that his sales force was much younger than that of the major companies and that the employees were knowledgeable about the music and involved in the music; statements by WEA's president, David Mount, published in the same magazine in 1994 stating that WEA had a goal to improve the representation of minorities on staff and to promote minority employees; circulation by WEA headquarters representative Kevin Carney of a 1997 article regarding pressure by Reverend Jesse Jackson's Rainbow/Push Coalition to increase the number of African-Americans and women in the record

industry and bemoaning the lack of black managers in areas other than black music; WEA's personnel policies recognizing the need to take affirmative steps to ensure equal employment opportunities for all and to vigorously pursue the hiring and promotion of minorities; WEA's monitoring of the number of minorities occupying management positions in the company; memoranda by various members of management regarding minority representation; and statements by management touting the number of management positions held by women and minorities.

B. Race discrimination claim based on the 1995 employment action

As additional evidence of reverse discrimination with respect to the 1995 employment action, plaintiff notes that he was never advised by any of his superiors that his job performance had been found to be lacking in any way; he was never informed of complaints by customers or employees; he never received progressive discipline; overall, Froio was very satisfied with plaintiff's performance; there exists substantial record evidence that Dale Hill was manifestly less qualified for the position of Sales Manager by virtue of his lack of experience; and there was evidence of "something fishy going on" in that the home office for the first time took the lead in pushing Hill as the primary candidate for the Sales Manager job and plaintiff was given little or no consideration for the job. Plaintiff also alleges that the racial composition of the decision makers is not dispositive and is only a factor for the jury to consider. Plaintiff concedes that he cannot show that he was similarly situated to Dale Hill and other black employees since there were no other similarly-situated black sales managers, but plaintiff contends that this is not fatal to his claims since the *McDonnell-Douglas* formula is not a rigid, mechanistic one.

Plaintiff also alleges that the reasons for promoting Dale Hill and demoting plaintiff in 1995 are pretextual. He summarizes the reasons as follows: Plaintiff was not a strong leader with good people skills, plaintiff was objectionable to Camelot Records, one of the key customers in the Cleveland marketplace, and plaintiff had several lapses in judgment reflected in his wearing a Nazi uniform at a costume party and being under the influence of alcohol on other occasions. Plaintiff alleges that these reasons are pretextual because the testimony offered by Dennis Schone regarding Camelot's Lou Garrett's alleged dissatisfaction with plaintiff is hearsay; Froio testified that he had no real problems with plaintiff's managerial skills; plaintiff was never counseled on his job performance; there is no evidence that he was ever warned or counseled about the Nazi costume, Schone never cited it to plaintiff as a reason why he would not get the job, and the incident occurred long before 1995; and plaintiff's indiscretions stemming from his alcohol use had happened over 15 years earlier and plaintiff was never counseled for them. Plaintiff also contends that he did suffer an adverse action in 1995 because he had substantially less authority and responsibility as Field Sales Manager than he had as Sales Manager, he had to report to a new Sales Manager, and he was no longer permitted to deal with higher members of management without first going through Hill. Finally, plaintiff concedes that his federal claims of unequal treatment in 1995 are time-barred but asserts that his claims under Ohio law were timely filed.

C. Race discrimination claim based on the 1999 closing

In order to establish unlawful discrimination in connection with the 1999 closing, plaintiff offers the same "direct" evidence of reverse discrimination offered to prove that he was unlawfully demoted in 1995. As further "direct" evidence of discrimination, plaintiff notes that WEA's Affirmative Action Plan and related documentation continued in effect and that the position of Field Sales Manager of Black Music has always been occupied by black employees across the country.

Plaintiff contends that circumstantial evidence of an unlawful discriminatory motive exists in that plaintiff was treated differently than Hill, who was similarly-situated to him. Plaintiff alleges that defendant promoted the interests of Hill over those of plaintiff despite Hill's unsatisfactory track record as Cleveland Sales Manager and despite the fact that plaintiff had been performing the Field Sales Manager job in Cleveland. Plaintiff also contends that he was bypassed for the position of Field Sales Manager in the Plliladelphia office in favor of a black employee, Jeanne White, who had never performed as a Field Sales Manager and who was less qualified than plaintiff, and that he was bypassed for the position of Field Sales Manager of Black Music in Philadelphia in favor of Mary Ressner, a black employee with a poor performance record who had not previously held a management position. Plaintiff contends that a reasonable jury could find "something fishy" in WEA's decision to pass plaintiff over for the open management position in Philadelphia in favor of three patently less qualified African-American employees.

Plaintiff argues that the reasons proffered by defendant for not offering him the management positions are pretextual, the

reasons being: (1) during a reduction in force, WEA had no legal duty to allow plaintiff to bump Fullard out of her job as Field Sales Manager in Cleveland, (2) plaintiff was unable to perform the job of Field Sales Manager of Black Music, (3) plaintiff never exhibited interest in the Philadelphia jobs and Milanese did not know he was interested in those jobs, (4) plaintiff had not had frequent and substantial interaction with Milanese as had Hill, White and Ressner, and (5) there is no evidence that White was inferior to plaintiff in terms of talent, experience and other credentials. Plaintiff contends that while an employee is not legally entitled to displace another employee whose position has been eliminated, WEA's refusal to offer him one of the Philadelphia positions ran contrary to the company's long-standing policy to bump managers to the next lowest managerial position and to bump other individuals from the lower positions rather than lay managers off during a period of downsizing. Plaintiff alleges that he was also denied the opportunity to bump Fullard, a younger black female, out of her position as Field Sales Manger of Black Music in the Cleveland Office, which position was moved to Detroit after the closure. Plaintiff also contends that defendant has no evidence to support a generalization that because plaintiff did not enjoy or understand black music, he could not excel at selling it. Plaintiff also argues that he did not show interest in the Philadelphia job because he was never told of the Field Sales Manager position in Philadelphia and the job was not posted. Plaintiff further argues that the offer of a position which entailed a decrease in yearly salary from approximately $100,000 to $64,000 was an adverse employment action.

D. Sex discrimination claim based on the 1999 closing

Plaintiff relies on the same arguments proffered in support of his 1999 race discrimination claim to show that he was

discriminated against on the basis of his sex when defendant filled open positions in other offices with equally or less qualified females.

E. Age discrimination claims

Plaintiff alleges that he can also establish, a prima facie case of age discrimination arising from the 1995 employment action and that he has come forward with credible evidence which suggests that the reasons offered for his alleged demotion are pretextual. As to the requirement that he come forward with additional circumstantial evidence of discrimination in connection with the 1999 employment action in view of the fact that he was terminated as part of a reduction in force, plaintiff alleges that the same evidence which demonstrates reverse race discrimination supports a finding of age discrimination. Plaintiff also asserts that the Sixth Circuit now holds that an employer's failure to transfer an older reduction-in-force victim to a position elsewhere in the company is circumstantial evidence supporting a finding of age discrimination. Plaintiff further contends that defendant has not offered any reason as to why Hill, White or Ressner were more qualified than plaintiff for the positions they were offered.

V. Defendant's reply

In reply, defendant asserts that plaintiff's evidence of WEA's discriminatory mind-set in fact simply reflects WEA's compliance with federal regulations regarding affirmative action required of WEA as a government contractor; the employment decisions affecting plaintiff were not made pursuant to the Affirmative Action Plan; comments by non-decision makers have no relevance to this lawsuit; newspaper articles that do not involve WEA have no relevance to this

case; comments about goals to improve and promote minority representation are not discriminatory; plaintiff's lack of a disciplinary record is irrelevant because plaintiff was not fired for sustained bad performance; WEA does not post openings for management positions so that its failure to do so in this case is not evidence of discrimination; plaintiff was aware of the openings in the Philadelphia branch, and the decision makers had no idea that plaintiff was interested in the positions; there is no evidence of a WEA "bumping policy" as alleged by plaintiff; the Sixth Circuit has never adopted the "something fishy" standard espoused by certain federal courts; the Cleveland District Sales Manager position was first offered to Larry Bole, a white male, before it was offered to Hill; Froio, a white male, had recommended against plaintiff for the position of Cleveland District Sales Manager; plaintiff cannot show that he was treated differently from similarly-situated employees; plaintiff cannot establish pretext; plaintiff was one of the few employees who was offered another position when the Cleveland office closed and there were no similarly-situated employees who were transferred; plaintiff has not shown that Fullard, Ressner and White were less qualified for the positions they were offered; and the fact that individuals younger than plaintiff received certain jobs is not evidence of age discrimination.

VI. Summary judgment standard

Fed. R. Civ. P. 56 allows summary judgment to secure a just and efficient determination of an action. This Court may only grant summary judgment as a matter of law when the moving party has identified, as the basis for its motion, an absence of any genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986).

The party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986) *(quoting First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253 (1968)). The evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor. *Anderson,* 477 U.S. at 255 *(citing Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158 (1970)). Summary judgment is not proper in employment discrimination cases when there is a substantial issue of fact as to whether an employer had a discriminatory intent or motive. *Leonard v. City of Frankfort Elec. & Water Plant Bd.*, 752 F.2d 189, 193 (6th Cir. 1985) *(citing Byrd v. Roadway Express, Inc.*, 687 F.2d 85 (5th Cir. 1982); *Williams v. DeKalb County,* 82 F.R.D. 10 (N.D. Ga. 1979)).

The court is not to weigh the evidence and determine the truth of the matter but is to decide whether there is a genuine issue for trial. *Anderson,* 477 U.S. at 249. There is no genuine issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Id.* at 249 *(citing Cities Serv.*, 391 U.S. at 288-289). If the evidence is merely colorable, *Dambrowski v. Eastland,* 387 U.S. 82, 84 (1967), or is not significantly probative, *Cities Serv.*, 391 U.S. at 290, judgment may be granted. *Anderson*, 477 U.S. at 249.

VII. Applicable law

Under the law of this Circuit, the same evidentiary framework applies to discrimination claims brought under Title VII, the ADEA, and state law. *Allen v. Ethicon, Inc.*, 919 F. Supp. 1093, 1098 (S.D. Ohio 1996)(Weber, J.)*(citing Mitchell v. Toledo Hospital,* 964 F.2d 577, 582 (6th Cir.

1992)). In order to establish an employment discrimination claim, plaintiff must introduce direct evidence of discrimination or prove inferential and circumstantial evidence which would support an inference of discrimination. *Kline v. TVA,* 128 F.3d 337, 348 (6th Cir. 1997). Plaintiff need only prove direct or circumstantial evidence, not both. *Id.* at 348-49. A plaintiff alleging reverse race discrimination can prove his case either by adducing evidence that race was a direct factor in the employment decision, or, alternatively, by adducing indirect evidence. *Weberg v. Franks*, 229 F.3d 514, 522-23 (6th Cir. 2000).

Direct evidence is "that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999)(citations omitted). Direct evidence makes the existence of unlawful discrimination "patent." *Weberg,* 229 F.3d at 524 (citing *Bartlik v. United States Department of Labor,* 73 F.3d 100, 103 n. 5 (6th Cir. 1996)). Evidence which requires the jury to infer a fact is not direct evidence. See *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1081 (6th Cir. 1994). Once the plaintiff has produced credible direct evidence, the burden of persuasion shifts to the defendant to show that it would have taken the challenged action if it had not been motivated by discrimination. *Jacklyn,* 176 F.3d at 926 (citations omitted). If plaintiff presents direct evidence of discrimination, the *McDonnell-Burdine* paradigm is of no consequence. *Kline,* 128 F.3d at 349.

If direct evidence of discrimination is lacking, plaintiff must prove a prima facie case of discrimination. In order to establish a prima facie case, the plaintiff must show:

> 1) that he is a member of a protected group, 2) that he was subject to an adverse employment decision, 3) that he was qualified for the position, and 4) that he was replaced by a person outside of the protected class.

Kline, 128 F.3d at 349. Plaintiff may establish the fourth prong of a prima facie case by showing that he was treated less favorably than a similarly- situated employee outside of his protected class. *See Betkerur v. Aultman Hosp. Ass'n,* 78 F.3d 1079, 1095 (6th Cir. 1996); *Mitchell v. Toledo Hospital,* 964 F.2d 577, 582-83 (6th Cir. 1992). In such a case, plaintiff must prove that all relevant aspects of his employment situation were similar to those of the non-minority employee with whom he seeks to compare himself. *Ercegovich v. Goodyear Tire & Rubber Co.,* 154 F.3d 344, 352 (6th Cir. 1998).

In reverse discrimination cases, the showing required to establish a prima facie case of discrimination is modified. *Murray v. Thistledown Racing Club, Inc.,* 770 F.2d 63, 66-68 (6th Cir. 1985); *Sampson v. Secretary of Transportation,* 182 F.3d 918 (Table)(6th Cir. June 23, 1999)(unpublished decision). Under the modified analysis, a plaintiff seeking to establish a prima facie case of reverse discrimination must show that: (1) "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority", and (2) plaintiff was treated differently than similarly-situated members of a protected group. *Pierce v. Commonwealth Life Insurance Co.,* 40 F.3d 796, 801 (6th Cir. 1994). Although the Court in *Pierce* expressed serious misgivings about a test which imposes a more onerous standard for a white plaintiff than for minority or female plaintiffs, the Court did not address this issue since it was unnecessary to the court's decision. *Id.* at

801 n.7. The Sixth Circuit continues to apply the test (see, e.g., *Yeager v. GM Corp.*, 265 F.3d 389, 397 (6th Cir. 2001) and *Campbell v. Hamilton County Ohio,* 23 Fed. Appx. 318, 2001 WL 1322785 (6th Cir. Oct. 17, 2001)) and earlier cases applying the test remain good law.

A plaintiff can establish background circumstances by producing evidence of the defendant's unlawful consideration of race in the past which justifies the "suspicion that incidents of capricious discrimination against whites because of their race may be likely." See *Jamison v. Storer Broadcasting Co.*, 830 F.2d 194 (Table), 1987 WL 44901 (6th Cir.)(citing *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981)). In its unpublished decision in *Sampson,* a panel of the Sixth Circuit determined that plaintiff had established a prima facie case of reverse discrimination when he submitted a large number of defendant's policies and procedure reflecting an organizational preference for establishing a diverse group of employees, but the Court went on to determine that the mere existence of affirmative action policies was insufficient to prove intentional discrimination against the plaintiff and that the plaintiff had not shown that the defendant had relied on these policies in selecting a minority individual for a position. Other federal circuits have found sufficient background circumstances to establish a prima facie case where there is some evidence that the employer has some reason or inclination to discriminate invidiously against whites or where there is evidence indicating that there is something "fishy" about the facts of the case that raises an inference of discrimination. *Harding v. Gray,* 9 F.3d 150, 154 (D.C. Cir. 1993)(citations omitted). The Court in *Harding* also stated that if a more qualified white employee is denied a promotion in favor of a minority employee with lesser qualifications, that in itself raises an

inference that defendant is that unusual employer who discriminates against the majority. *Id.* at 153-54.

Conversely, the fact that a majority of an employer's management staff are white men is evidence that the employer does not discriminate against the majority. *Garnet v. General Motors Corp.,* 114 F. Supp.2d 649, 657-58 (N.D. Ohio 2000). The Court in *Garnet* noted that the statistical evidence offered by the defendant in that case clearly established that defendant employed substantially more white males than women or racial minorities, *id.* at 657. The Court found no proof that defendant GM discriminates against white males and stated that merely administering a program which affords women and minorities greater opportunities to obtain positions in a workforce that is dominated by white males does not rise to the level of intentional discrimination against the majority. *Id.*

If plaintiff establishes his prima facie case, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment decision. *McDonnell Douglas Carp. v. Green,* 411 U.S. 792 (1973) and *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981). This is required in a reverse discrimination case as in all other discrimination cases. *Sampson,* 182 F.3d 918. If the defendant carries its burden, the plaintiff must prove that the proffered reason is pretextual. *McDonnell Douglas,* 411 U.S. 792; *Burdine,* 450 U.S. 248. The plaintiff can establish pretext by a direct showing that a discriminatory reason more likely motivated the employer or by indirectly showing that the employer's reason is not credible. *Kline,* 128 F.3d at 342-43. Under appropriate circumstances, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer

unlawfully discriminated." *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2109 (2000).

In a failure to promote case, the plaintiff does not have to establish that he applied for and was considered for a promotion when the employer does not notify its employees of the available promotion or does not provide a formal mechanism for employees to express an interest in the promotion. *Dews v. A.B. Dick Company,* 231 F.3d 1016, 1022 (6th Cir. 2000). Instead the company is obligated to consider all those who might reasonably be interested in a promotion were its availability made generally known. *Id.*

An employer who reduces its work force for economic reasons is not required to transfer an employee whose position has been eliminated or to displace workers with less seniority. *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 942 n.6 (6th Cir. 1987); *Barnes v. GenCORP, Inc.*, 896 F.2d 1457, 1469 (6th Cir. 1990). However, the employer violates the anti-discrimination laws when it transfers other displaced employees but does not place the plaintiff in a new position because of discrimination. *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 351 (6th Cir. 1998). In a reduction of force situation, the plaintiff must come forward with additional direct, circumstantial or statistical evidence that age, race or sex was a determining or motivating factor in his termination. *Ridenour v. Lawson Co.*, 791 F.2d 52, 57 (6th Cir. 1986). An employee denied the opportunity to transfer establishes a prima facie case of discrimination when he produces evidence demonstrating that:

> 1) he or she is a member of a protected class; 2) at the time of his or her termination he or she was qualified for other available positions within the corporation; 3) the employer did not offer such positions to the

> plaintiff; and 4) a similarly-situated employee who is not a member of the protected class was offered the opportunity to transfer to an available position, or other direct, indirect, or circumstantial evidence supporting an inference of discrimination.

Ercegovich, 154 F.3d at 351. For purposes of establishing his prima facie case, the plaintiff must establish that the individuals with whom he seeks to compare himself were "similarly situated in all of the relevant aspects." *Ercegovich,* 154 F.3d at 351; *Pierce,* 40 F.3d at 802. An employer's decision to redeploy younger employees while not redeploying older employees is a recognized form of adverse employment action. *Scott v. The Goodyear Tire & Rubber Co.,* 160 F.3d 1121, 1128-29 (6th Cir. 1999)(citing *Hawley v. Dresser Industries, Inc.,* 958 F.2d 720, 723 (6th Cir. 1992)).

In considering whether an employment action was materially adverse, the Court should consider whether the plaintiff suffered a demotion as evidenced by a decrease in wage or salary, a material loss of benefits, or significantly diminished material responsibilities, or other indices that might be unique to the plaintiff's particular situation, *Id.* (citing *Crady v. Liberty Nat'l Bank and Trust Co.,* 993 F.2d 132, 136 (7th Cir. 1993)). "[A] change in employment conditions 'must be more disruptive than a mere inconvenience or an alteration of job responsibilities.'" *Kocsis,* 97 F.3d at 886. In the constructive discharge context, the Sixth Circuit has affirmed a district court ruling setting forth the general rule that "[b]arring unusual circumstances,... a transfer at no loss of title, pay, or benefits does not amount to... [an] adverse employment action." *Id. (citing Darnell v. Campell County Fiscal Court,* 731 F. Supp. 1309, 1313 (E.D. Ky. 1990), *aff'd,* 924 F.2d 1057 (6th Cir. 1991)(Table).

VIII. Opinion

A. Claims arising from the 1995 employment action

Defendant does not dispute that plaintiff's state law claims of reverse discrimination and age discrimination arising from the 1995 decision to promote Dale Hill to the position of Sales Manager of the Cleveland office and to place plaintiff in the Field Sales Manager position are not time-barred. Accordingly, the Court will consider the claims on their merits.

The Court finds that defendant is entitled to summary judgment on plaintiff's claims of reverse race discrimination and age discrimination stemming from the 1995 decision. Plaintiff has not come forward with evidence which, if believed, establishes that the change in his position was a materially adverse action. It is undisputed that plaintiff received no cut in salary and that his benefits remained unchanged as a result of the change. Plaintiff alleges, however, that he was demoted in terms of his stature and responsibility. Plaintiff contends that as Cleveland Field Sales Manager, he had substantially less authority and responsibility than he had commanded as Sales Manager, he had to report to a new Sales Manager, Hill, who was many years his junior and who reinforced plaintiff's sense of subordination upon his arrival at the Cleveland facility, and his day-to-day responsibilities were significantly diminished. Plaintiff makes no specific allegations, however, to support a finding that his responsibilities and duties were modified to such a degree that the change in positions constituted a materially adverse employment action.

More importantly, plaintiff has not shown that he suffered any damages as a result of the change in positions. Plaintiff

does not allege that his working conditions were intolerable or that they resulted in his constructive discharge. To the contrary, plaintiff continued in the Field Sales Manager position for four years until the decision to close the Cleveland office was made. Because plaintiff has not come forward with sufficient evidence to permit a finding that he suffered a materially adverse change in his employment situation or a constructive discharge, or that he suffered any damages as a result of the 1995 employment action, he cannot establish his discrimination claims arising from the 1995 decision.

Plaintiff's claim of reverse discrimination arising from the 1995 decision must fail for the additional reason that plaintiff has not come forward with direct evidence of discrimination or circumstantial evidence sufficient to establish a prima facie case. Plaintiff alleges that there is direct evidence of reverse discrimination in connection with the 1995 decision. Plaintiff argues that the existence of WEA's alleged facially invalid Affirmative Action Plan and ancillary documents in this case, coupled with circumstantial evidence that defendant was motivated by the Plan, suggests that defendant was motivated by pure racial considerations when it promoted Dale Hill to take plaintiff's position. Plaintiff has cited no cases from the United States Supreme Court or the Sixth Circuit, however, which support his position that WEA's Affirmative Action Plan is invalid because it lacks specifics or because it unnecessary trammels the interests of majority employees.

Irrespective of the validity of WEA's plan, the Court declines to adopt the position that WEA's Affirmative Action Plan, coupled with other evidence of record, constitutes direct evidence of discrimination based on plaintiff's race. In support of his position, plaintiff cites several cases from other circuits holding that an affirmative action plan may constitute

direct evidence of discrimination, even when the employer denies having acted pursuant to the plan. See, e.g., *Bass v. Board of County Commissioners,* 256 F.3d 1095, 1110 n.7 (11th Cir. 2001)(likening an affirmative action plan to statements by decision makers clearly evincing a discriminatory intent and obviating the need to rely on an inference of discrimination). Under the established law of this Circuit, however, direct evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's decision. The mere existence of an affirmative action plan, coupled with other circumstantial evidence of discrimination, does not require that conclusion, particularly where the employer has denied acting pursuant to the plan and there is no direct evidence to the contrary. Accordingly, WEA's Affirmative Action Plan, statements made by individuals within WEA regarding a goal to increase minority representation within WEA's workforce, and the compilation of statistics reflecting minority representation at WEA do not constitute direct evidence that defendant acted with a discriminatory motive.

Construing WEA's Affirmative Action Plan and the statements cited by plaintiff as circumstantial evidence, such evidence, if believed, does not support a finding that defendant is that unusual employer who discriminates against the majority. First, although plaintiff alleges that there is a question of fact for the jury as to whether defendant relied on the Plan in making the decisions in issue, plaintiff has not come forward with any evidence to support a finding that defendant did rely on the Plan in making these particular personnel decisions. Second, defendant notes that as a government contractor with at least $50,000 worth of government contracts per year, it is required to maintain an Affirmative Action Plan designed to ensure equal employment opportunities, to disseminate the Plan internally and

externally, to monitor and examine its employment decisions and compensation systems to evaluate the impact of those systems on women and minorities, and to maintain and make available documentation of its compliance with federal regulations. See 41 C.F.R. §§ 60-2.1(b)(1)(i), 60-2.10(a)(2) and (c) and 60-2.17(d). While defendant's federally-mandated compliance with these regulations does not insulate it from liability for reverse discrimination, neither do defendant's compliance and statements related thereto support a finding that defendant is that unusual employer who discriminates against the majority.

Plaintiff has failed to come forward with additional circumstantial evidence indicating that the individuals involved in the decision to move plaintiff to a different position, each of whom is a white male, discriminated against members of their own race. Consistent with the Sixth Circuit's requirements for establishing a prima facie case of reverse discrimination, plaintiff may not establish his prima facie case simply by showing that he was treated less favorably than a minority individual. Rather, plaintiff must come forward with evidence of background circumstances which support a finding that defendant is that unusual employer who discriminates against the majority. Plaintiff has not carried his burden. There is no evidence of unlawful consideration of race as a factor in past hiring or promotion decisions which justifies a suspicion that discrimination against whites based on their race may be likely. See *Jamison,* 830 F.2d 194 *(citing Parker v. Baltimore & Ohio R.R. Co.,* 652 F.2d 1012, 1017 (D.C. Cir. 1981)). There is no statistical evidence in the record which establishes that defendant employed a disproportionate number of racial minorities and females in management positions (see, e.g., *Yeager,* 265 F.3d at 397)(evidence that GMC is that unusual employer who discriminates against the majority was lacking

where statistics showed that a large percentage of candidates in defendant's apprenticeship program were white men). There is no evidence that defendant went beyond its stated goal of attempting to foster and achieve diversity within its workforce and denied non-minority individuals positions for which they were qualified because of their race. In view of the absence of such supporting evidence sufficient to establish the first prong of a prima facie case of reverse discrimination, plaintiff's claim of reverse race discrimination arising out of the 1995 employment action must fail.

B. Claims arising from the 1999 Cleveland office closing

Plaintiff asserts claims of race, sex and age discrimination arising out of the 1999 closing of the Cleveland office. Plaintiff concedes that the 1999 closure was a legitimate reduction in force. Plaintiff contends, however, that defendant's failure to transfer him to specified positions available in other offices was based on plaintiff's race, gender and age.

Plaintiff has not produced direct evidence of discrimination in connection with the 1999 employment action. The Court finds that plaintiff has also failed to establish a prima facie case of discrimination based on defendant's failure to transfer him to particular positions which plaintiff desired. First, for the reasons stated above, plaintiff has failed to come forward with sufficient evidence which, if believed, supports a finding that defendant is that unusual employer who discriminates against the majority so as to permit plaintiff to proceed with his reverse race and sex discrimination claims.

Second, plaintiff has not shown that he was treated differently than similarly-situated minority individuals or

females and younger employees. This is not a situation where defendant declined to place plaintiff in a new position while transferring other displaced employees. Rather, it is undisputed that defendant offered plaintiff continued employment as a Sales Representative at a salary of $64,000 per year and that the majority of employees in the Cleveland office were not offered different positions within the company. Plaintiff has identified only one other employee from the Cleveland office who was offered a new position and that is Dale Hill, who was offered the Field Sales Manager position in Philadelphia but declined the offer. Defendant's offer of a position to Dale Hill does not support plaintiff's reverse discrimination and age discrimination claims. First, there is no indication in the record that the position offered to Hill was more favorable than that offered to plaintiff in terms of salary and benefits. Second, plaintiff and Hill were not similarly situated in all relevant respects at the time the Cleveland office closed. Rather, Hill was the person in charge of the Cleveland office and reported directly to Milanese, the Philadelphia Branch Manager, while plaintiff was the second-in-command and reported to Hill. Although plaintiff claims that he should not be required to show that he was treated differently than similarly-situated minority individuals because there were no black managers who were similarly situated to him, plaintiff has not come forward with other evidence to establish a prima facie case of reverse race discrimination.

Plaintiff also alleges that he was treated less favorably than Fullard, another individual from the Cleveland office. It is undisputed, however, that Fullard did not assume a new position after the Cleveland office closed but continued to perform her same job out of a different office. Defendant had no legal obligation to bump Fullard from her position, and its decision to allow her to retain her position is not evidence of discrimination. Plaintiff has not identified the other employees

in the Cleveland office who were offered new positions and those who were not, so that the record does not establish that plaintiff received less favorable treatment than younger, minority and female employees displaced as a result of the office closure.

Defendant's failure to offer plaintiff the position of Philadelphia Field Sales Manager or Field Sales Manager of Black Music in Philadelphia is likewise not sufficient to establish plaintiff's prima facie case. Plaintiff has not shown tlaat he was treated less favorably than the black females who assumed those positions, White and Ressner, since the salary offered to plaintiff for the Sales Representative position was more than the salaries paid to White and Ressner in their new positions. Moreover, White and Ressner were not similarly situated to plaintiff. These employees were not employees of the Cleveland Branch who were displaced by the closing of that office but were employees of the Philadelphia Branch Office. Defendant's decision to promote these individuals to positions within their own branch instead of offering the positions to plaintiff is not evidence that defendant acted with a discriminatory intent. Plaintiff has not offered other direct, indirect or circumstantial evidence which supports an inference of discrimination.

IX. Conclusion

Plaintiff's claims of discrimination under federal law based on defendant's 1995 decision are time-banned, so that defendant is entitled to summary judgment on these claims. Plaintiff has failed to establish discrimination based on direct evidence or a prima facie case of discrimination under state law with respect to tlae 1995 employment action. Plaintiff has also failed to establish his discrimination claims arising from the closing of the Cleveland office in 1999 and defendant's

failure to offer plaintiff certain other positions after his was eliminated. Accordingly, defendant is entitled to summary judgment on those claims.

It is therefore ORDERED that defendant's motion for summary judgment is GRANTED. This case is DISMISSED with prejudice at plaintiff's cost and is TERMINATED on the docket of this Court.

IT IS SO ORDERED.

/s/_____
HERMAN J. WEBER, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 02-3602

PETER M. HAGAN, JR.	)
Plaintiff-Appellant,	)
	)
v.	)
	)
WARNER/ELEKTRA/ATLANTIC CORPORATION,	)
Defendant-Appellee.	)
	)

PETITION FOR REHEARING AND REHEARING *EN BANC*

Donald B. Hordes, Esq. (0014212)
SCHWARTZ, MANES & RUBY
2900 Carew Tower, 441 Vine Street
Cincinnati, Ohio 45202-3090
(513) 579-1414 | (513) 579-1418 FAX
dhordes@smrfirm.com

Attorney for Plaintiff-Appellant,
Peter M. Hagan, Jr.

Peter M. Hagan, the Appellant herein, hereby respectfully petitions this Panel for a rehearing as to the decision rendered by it on March 10, 2004 (copy of Panel Decision attached hereto as Attachment A) as well as for a rehearing en banc. The basis for this Petition is as follows:

1. The Panel Decision conflicts with the decisions of the Sixth Circuit Court of Appeals in *Franulic v. Bozell Worldwide*, 2001 U.S. App. LEXIS 27310 (6th Cir. Dec. 21, 2001)[1] *Logan v. Denny's, Inc.*, 259 F. 3d.558 (6th Cir. 2001); *Herendeen v. Michigan State Police*, 39 F. Supp. 2d 899 (W.D. Mich. 1999); *Wexler v. White's Fine Furniture, Inc.*, 317 F. 3d 564 (6th Cir. 2003); *English v. Baptist Healthcare System, Inc.* 2003 U.S. Dist. LEXIS 921 (W.D. Ky. 2003); *Abrams v. Millikin & Fitton Law Firm*, 267 F. Supp. 2d 868 (S.D. Ohio 2003).

Consideration by the full Court is therefore necessary to secure and maintain uniformity of this Circuit's decisions.

2. Consideration by the full Court is also necessary in that the issue of whether an employer's maintenance of race-conscious employment policies, and acting discriminatorily pursuant to those policies, constitutes direct evidence of discrimination has never been addressed by this Court.

3. As to the Petition for Rehearing by the original Panel, Appellant, citing 6 Cir. R. 35(c), respectfully submits that the Circuit Panel erred in its recitation of many key facts of this

---

[1] All unpublished cases are included alphabetically in the Attached Appendix of Cases.

case, which caused the Panel to arrive at legal conclusions it otherwise would not have made.

I. The Circuit Panel erred in its failure to find that Appellee WEA engaged in direct reverse race discrimination.

The Circuit Panel misperceives Appellant Hagan's claim. Mr. Hagan has never relied exclusively on WEA's adhering to an affirmative action plan. Rather, the crux of his argument is that WEA embarked on a comprehensive campaign to implement a series of race-conscious hiring and promotion measures, over and above, and independent of, the promulgation of its affirmative action plan. Hagan cited to the Panel a myriad of pronouncements and personnel measures undertaken to increase the number of minorities in management so as to redress their historical underutilization. WEA CEO David Mount's clearly articulated aim of increasing the hire of minorities and his proud citation of WEA's track record under his administration are a matter of record.[2] Hagan also cited pressure placed by WEA's California home office on its Branch Managers throughout the country to track and report back to headquarters the Branch's progress in increasing minority representation. Hagan's supervisor in the Cleveland Branch Office, Richard Froio, frequently reported back to California his anxiety over his inability to achieve the desired results and his resolve to try harder.

---

[2] In the interest of brevity, and in order to keep within the 15-page limitation of this Brief, Hagan is unable to cite the Court to relevant excerpts from the record. These citations are fully set forth throughout Hagan's Final Appellate Brief and Final Reply Brief.

Hagan also adduced evidence of a number of quotes of Dave Mount in a trade magazine wherein he voices his intent to maximize the hiring and promotion of minority individuals and females. Finally, Hagan adduced evidence tending to show the pressure imposed by Jesse Jackson and the Rainbow Coalition on WEA and other record companies to hire more African-Americans into management.

Contrary to the assertion of the Circuit Panel, there is precedent within the Sixth Circuit on point in support of Hagan's position. In *Herendeen v. Michigan State Police*, 39 Supp. 2d 899 (W.D. Mich. 1999) the Court cited as direct evidence of discrimination an employer's corporate policies in which managers were required to take race into consideration in making decisions as to who to promote. The Court also cited a goal by the company that it's workforce should reflect the society it serves.

The Circuit Panel took Hagan to task for failing to establish any evidence of a causal connection between "the Plan" and his demotion, (Circuit Panel Decision at 4-5)[3] as if

---

[3] The Circuit Panel's use of quote marks around the word "demotion" suggests skepticism that Hagan truly suffered an adverse employment action. However, Hagan has gone to great lengths throughout the briefing process to show that he was truly demoted in terms of job responsibility, even if it did not reflect a diminution in pay and benefits. Whereas before the transition he was the Branch Sales Manager, the top sales executive in the Cleveland office, he was now given the lesser title of Field Sales Manager. His former position was taken over by Dale Hill, who now occupied the top sales executive position as the new Sales Manager out of the Cleveland office. Hill took over all of Hagan's former job functions and job responsibilities. Hagan has taken great pains to adduce evidence that he had suffered a real loss of job

the only way Hagan could prove his case is to introduce testimony that WEA managers stated outright that Hill was given Hagan's job in furtherance of WEA's goal to increase its complement of African-American managers. However, rarely is such evidence offered on a silver platter. That is why the various circuit court decisions cited by both Hagan and the Circuit Panel allow reverse discrimination plaintiffs like Hagan to introduce evidence that the employer's race-conscious hiring and promotion policies actually motivated the at-issue decision. *Bass v. Board of County Commissioners*, 256 F. 3d 1095, (11th Cir. 1999). *Messer v. Meno*, 130 F2d 130, 139 (5th Cir. 1997); *Herendeen*, supra.

Here, Hagan has adduced into the record a significant quantum of evidence that WEA's decision to promote Dale Hill into Hagan's former position of Sales Manager was part and parcel of its race-conscious promotion plan, as opposed to a dispassionate conclusion that Hill was objectively more qualified than Hagan. (1) Hagan was doing a good job. The Cleveland territory which he oversaw was amongst the top performers in terms of sales. (2) Even after the territorial configuration had been decided upon, Rick Froio informed Hagan the job of Cleveland District Sales Manager was his. (3) Hill was demonstrably far less qualified than Hagan. He had had virtually *no* sales experience and *no* managerial experience. (4) Hill's promotion to Cleveland District Manager was a foregone conclusion. He had been hand

---

responsibilities in his new subordinate position as Field Sales Manager. He no longer had direct access to the Branch Manager, who now resided in Chicago. Also, he was isolated from direct contact with the Cleveland Branch sales personnel and customers.

picked by WEA's California home office.[4] (5) Hagan had been kept in the dark as to the fact that he now had to compete for his old job. He was not offered the chance to interview for the position, until he learned about the "opening" second-hand and thereafter demanded the opportunity to interview. And even then, his interview was perfunctory. This is precisely the type of evidence that Circuit Court, including the ones whose decisions the Circuit Panel has cited, have viewed as evidence probative of a discriminatory motive to favor minorities over non-minorities. In *Messer*, supra. WEA's motivation in this case is certainly a question of fact. A jury could reasonably conclude from all of the evidence set forth above that WEA's decision to bring in Hill to occupy the top sales position in Cleveland, and demoting Hagan to a position subordinate to Hill, *was at least a motivating factor* in WEA's decision to adhere to its race-conscious policy of promoting the advancement of African-Americans into its management ranks. *Jacklyn v. Schering-Plough Healthcare Products*, 176 F.3d 921, 926 (6th Cir. 1999); WEA's motivation is a jury question, not to be resolved on summary judgment. *Bass*, supra at 1110.

---

[4] The Home Office was the decision maker, not Dennis Schone, as the Circuit Panel found. See p.7 *infra*.

II. The Circuit Panel's Conclusion that Appellant Hagan Failed to Adduce Credible Evidence so as to Rebut WEA's Non-discriminatory Reasons for Replacing him with Hill in 1995 and laying him off in 1999 is Contrary to Established United States Supreme Court and Sixth Circuit Precedent.

A. Introduction

Ordinarily, it is unnecessary to dwell on standards a federal court must follow in deciding whether or not to grant summary judgment. The law has been established for years. However, because the Circuit Panel (and the lower court) have failed altogether to apply these standards in this case, Hagan is now compelled to call these standards to the attention of the Court *en banc*, as well as to the Circuit Panel for its reconsideration. The Circuit Panel itself framed the question correctly in its decision. When considering whether the non-moving party has established the existence of a genuine issue of material fact, the Court must examine *de novo* all of the documentary and testimonial evidence the record, drawing in the process *all inferences from the underlying facts in the light most favorable to the non-moving party*. Panel Decision at 3 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48). This is the law of this Circuit as well. *Smith v. Kentucky State University*, 2003 U.S. App. LEXIS 26702 (6th Cir., Dec. 22, 2003); *Fuhr v. School Dist. Of the City of Hazel Park*, 2004 U.S. App. LEXIS 5449 at *12 (6th Cir., March 24, 2004). This is also the law in Ohio. *Holowell v. Society Bank & Trust*, 78 Ohio App. 3d 574, 578 (1992).[5]

---

[5] Ohio law is relevant since many of Hagan's claims are pendant state claims.

B. The 1995 Demotion

The Circuit Panel's analysis of Hagan's 1995 demotion claim runs altogether contrary to these principles. Basically, the Panel cites all of the proffered reasons given by Dennis Schone in support of his belief that Hagan was unworthy to continue as Sales Manager of the Cleveland Office. (Panel Decision at 6). The Court recognized that Hagan had adduced evidence that he "may indeed been a good choice to head the Cleveland office", but the fact that Schone "believed" Hagan was not a good choice carried the day (Panel Decision at 7).

Such reasoning flies in the face of the summary judgment standards outlined above. WEA's motivation was a question of fact. Yet, the Panel has acted as the fact finder by only considering Schone's rationale for demoting Hagan instead of allowing a jury to weigh all of the conflicting evidence. Considering only the facts that favor the moving party allows a Court to find in favor of the movant in an unfair, one-sided analysis. *Erwin v. Potter*, 2003 U.S. App. LEXIS 22806 at * 897-898 (6th Cir., Nov. 4, 2003). But this is precisely what the Panel did: (1) It ignored altogether the record evidence adduced by Hagan that Schone was never the decision maker, but that Hill's promotion to the Cleveland office was foisted on him by WEA's headquarters. Schone had stated to others that Hill had been forced on him, and was Schone's "cross to bear." (2) Assuming that Schone was the decision maker, the Panel ignored altogether the fact Schone could not have been all that fixated on Camelot's unease with Hagan, in that Hill had no sales experience at all. (3) The panel also overlooked the fact that the Nazi costume event took place several months earlier, and that nobody had made an issue of it at the time, and that Hagan had asked his Jewish hostess ahead of time whether she would be offended by the costume. (4) The Panel also overlooked the fact Hagan's

intoxication had taken place several years earlier, while he was going through a divorce, and suffering post-traumatic stress syndrome from his combat duty in Viet Nam. All of these facts create inferences, drawn most favorably for Hagan, whereby a jury could reasonably conclude that Schone's (or WEA's) decision to demote Hagan was a pretext for reverse race discrimination.

Hagan adduced a mountain of additional evidence, altogether ignored by the Panel, which created inferences which the Panel should have drawn in a light most favorable to him: (1) WEA's aforesaid underlying preoccupation with the "under-utilization" of African-Americans in its management ranks; (2) Hagan's clear advantages over Hill in terms of company seniority, sales experience (Hill had none), and executive experience (Hill had none); (3) Hagan's admirable sales record. His Branch was always amongst the leaders in sales. He received accolades, and was once named Field Sales Manager of the Year; (4) Froio's initial assurances to Hagan and one of his co-workers after the 1995 realignment that his current position as Cleveland District Sales Manager, i.e. *the top executive sales position*, was safe; (5) the unprecedented nature of Hill's promotion --- pushed by California headquarters to be leapfrogged over intermediate levels of executive responsibility; and (6) the failure to advise Hagan that his job was up for grabs, or to interview him seriously.

Instead of addressing and considering all of this evidence, the Panel brushed off Hagan's claim of reverse discrimination as "only speculation" (Panel Decision at 8). This conclusion is unwarranted. Hagan has not engaged in speculation. He has adduced an impressive array of evidence which has created strong inferences that, if resolved in his favor, would

certainly allow a jury to reasonably conclude that Hill was chosen to replace him because of his race.

C. The 1999 Reduction in Force

The Panel again takes a one-sided and skewed view of the evidence. As was the case with Schone, it takes Ray Milanese's self-serving testimony at face value that he was familiar with and favorably disposed towards Hill's performance as District Sales Manager, but not Hagan's. That is why he chose Hill and not Hagan for the transfer to Philadelphia when the Cleveland office closed. In so doing, it ignores a substantial body of evidence to the contrary, which, if credited, would allow a reasonable jury to conclude that Milanese knew, or should have known, that Hill was a disaster as Sales Manager, far inferior in terms of performance than Hagan, who had occupied the position for several years prior. Here is the list of the evidence adduced by Hagan, all of which was overlooked by the Panel:

1. Hill was a terrible performer. Numerous employees in the Cleveland office testified in deposition that Hill would curse at them, scream at them, openly referred to his own secretary as a bitch, and assaulted one of his subordinates at a sales meeting.

2. One of the female employees in Cleveland complained to WEA's home office that Dale Hill had harassed her, and threatened to file a lawsuit. Nothing was done to warn or counsel Hill about this.

3. Schone ultimately wrote a lengthy scathing memo to Hill questioning his honesty, competency, and inability to service the customers. It strains credulity that Milanese was not aware of all of this.

4. Milanese in any event later admitted that he was told by outgoing Branch Manager Schone about Hill's shortcomings. He further admitted that he was made aware of the female employee's complaint about Hill's harassment and her threatened lawsuit.

Given all of this evidence, who would be the best candidate for the transfer to Philadelphia? Hill, a poor performer who has a record of dishonesty, crudity, violence, and inability to get along with customers? Or Hagan, his assistant, who competently performed the job of Sales Manager in the past, and who was currently performing in the same Field Sales Manager job for which there was a vacancy in Philadelphia? A jury is certainly capable of reasonably concluding that Hagan was a far better choice than Hill. Giving Hagan the benefit of the doubt, as a court must in the context of a Motion for Summary Judgment, the Panel should have drawn the favorable inference that the only reason Hill was selected for transfer was that he was a minority individual and therefore, in WEA's mind, a sacred cow.

Similarly, Hagan's argument that had he not been unfairly and unlawfully demoted back in 1995 he, not Hill, would have worked closely with Milanese and thus gotten the nod for the Philadelphia vacancy is not "speculation" as the Panel characterizes it. (Panel Decision at 9). Hagan's long track record as an effective Sales Manager and before that as Field Sales Manager, as well as his prior good relationship with Froio and his predecessors creates a inference that he would have gotten along with Milanese as well, another inference which should be resolved in Hagan's favor.

The same argument can be made with regard to WEA's later choice to fill the vacancy with Jeannie White. The Panel overlooked the evidence adduced by Hagan that White had no

sales experience outside the limited genre of Black Music. Hagan, by contrast, had several years of experience as a salesman, Field Sales Manager, and Sales Manager selling *all* types of music. Hagan had more overall seniority in the company than did the far younger minority individual White. A favorable inference can, and should, be drawn that from any objective standpoint, Hagan was a far more suitable candidate than White to fill the vacancy, and indeed would have been awarded the job but for the fact that White was young and African American. The Panel did not even address the Hagan vs. White issue.

The Panel rejected Hagan's argument that he then should have been selected over Mary Ressner to fill the resultant Philadelphia vacancy of Field Sales Manager--Black Music, because Hagan admitted that he neither understood nor enjoyed black music. However, the Panel ignored the fact that Hagan nonetheless had always done well overseeing the selling of black music out of the Cleveland office. The obvious and reasonable inference is that one doesn't have to appreciate or even understand the substance of black music, as long as he has enough marketplace savvy and know-how to sell it. The Panel again refused to draw an inference in favor of Hagan.

The Panel rejects Hagan's claim of bumping rights into the position in Detroit on the basis that WEA managers denied the existence of a bumping policy. (Panel Decision at 10-11). The Panel discounts Hagan's first hand knowledge that a bumping policy existed, labeling it as "his own unsupported claim", notwithstanding the fact that his claim was corroborated by the affidavit of a co-worker. *Id.* Simply put, the Panel looked at factually conflicting evidence as to the existence of a bumping policy, and chose to credit the

testimony of WEA. Again, the Panel has usurped the role of the jury in making credibility resolutions and findings of fact.

Finally, the Panel rejects all of Hagan's 1999 downsizing claims on the basis that "he was offered a higher paying sales job anyway" (Panel Decision at 11). The Panel pulls this finding out of thin air. There is no finding that the sales position that Hagan was offered in 1999 was higher paying. The evidence shows just the opposite, that the compensation Hagan would have made as a territory salesperson was markedly *less* than he had been making as Field Sales Manager. To be sure, the Court could draw an inference that the sales job would have commanded more of a salary than either White or Ressner ended up making in Philadelphia. However, the opposite inference could also be drawn that Hagan would have kept his current higher Cleveland salary had he been transferred to Philadelphia, especially in a lateral move to the same Field Sales Manager position. In fact, when Hagan had been demoted in 1995 from Sales Manager to Field Sales Manager, he was allowed to keep his old salary. So the Panel once more erred in failing to draw the reasonable inference in favor of Hagan that the sales job he was offered was less than what he would have made had he been transferred to Philadelphia. Even were Hagan's salary as a salesperson more than that he would be making as a Field Sales Manager in Philadelphia, the obvious loss of responsibilities would itself constitute an adverse action which would justify his refusal to accept the sales job. *Kocsis v. Multicare Management*, 97 F.3d 876 (6th Cir. 1996); *Abrams v. Millikin & Fitton Law Firm*, 267 F. Supp. 868-874-875 (S.D. Ohio 2003); *English v. Baptist Healthcare System, Inc.*, 2003 U.S. Dist. LEXIS 921 at *10-14 (W.D. Ky. 2003).

III. Conclusion

After reading the Panel Decision, one is left with the impression that the Panel, like the lower court before it, merely lifted from a prior decision the boilerplate language on the standards for granting or denying summary judgment and pasted it into its Panel Decision, without truly reading and applying the principles set forth in that boilerplate. Time and time again throughout its decision, the Panel went out of its way to resolve all credibility resolutions and draw all permissible inferences in favor of the moving party WEA instead of the non-moving party Hagan. In so doing, the Panel turned its back on a solid and long line of Sixth Circuit precedent. One cannot help but think that were Hagan a well-qualified African-American (or female) employee who was suddenly replaced by a markedly less qualified white (or male) employee, and was later passed over for transfer to fill a vacancy in favor of white (or male) employees whose performance was abysmal, or whose experience in the at-issue jobs was minimal or non-existent, all against a backdrop to a self-admitted goal to hire white people whenever possible, this Court would have no problem rejecting the employer's motion for summary judgment, and allowing the alleged victim to have his or her day in court. In fact, this Circuit has disposed of motions on this basis time and time again. See *Franulic v. Bozell Worldwide, Inc.* 2001 U.S. App. LEXIS 27310 at *25-26 (6th Cir. 2001), *Smith* supra at *6; *Fuhr* supra at *12. However, cases where reverse discrimination plaintiffs have survived summary judgment are noticeable by their absence. Hagan, a white reverse discrimination plaintiff, must be given the same benefit of the doubt in terms of credibility resolutions and drawing of inferences as any other Title VII plaintiff at the summary judgment phase of this litigation. This is not to say that Hagan will ultimately prevail were this case to proceed to trial. Each side will be free to present any

evidence it deems persuasive. Suffice it to say however that Mr. Hagan has adduced sufficient direct and circumstantial evidence whereby a jury could reasonably conclude that Hagan was demoted and later denied a transfer because of WEA's race-conscious bias. *Franulic* supra at *26-27. Hagan, too, deserves his day in Court.

For all of these reasons, Hagan respectfully asks this Panel to rehear the case, and reconsider all of his evidence. Barring that, Hagan respectfully requests an en banc rehearing of the entire appeal.

Respectfully submitted,

OF COUNSEL:

Donald B. Hordes (0014212)
Schwartz, Manes & Ruby
2900 Carew Tower
441 Vine Street
Cincinnati, Ohio 45202-3090
513/579-1414 | FAX 513/579-1418
dhordes@smrfirm.com
Attorney for Plaintiff-Appellant,
Peter M. Hagan, Jr.

CERTIFICATE OF SERVICE

I hereby certify that a copy of Plaintiff-Appellant's **Petition For Rehearing And Rehearing *En Banc*** was served by ordinary U.S. Mail on David Skidmore, Esq., Frost, Brown and Todd, 2500 PNC Center, 201 East Fifth Street, Cincinnati, Ohio 45202-4182, on this 7th day of April, 2004.

_____

Donald B. Hordes

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1- 00-412

[Filed December 21, 2001]

PETER M. HAGAN,)
Plaintiff,)
)
v.)
)
WARNER/ELEKTRA/)
ATLANTIC CORP.,)
Defendant.)
)

PLAINTIFF'S MEMORANDUM CONTRA DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant's selective citation to limited facts in the vast documentary and testimonial record of this case[1] does not

[1] The parties took 18 depositions in 7 cities across the country, totaling approximately 4000 pages. Over 100 exhibits were introduced by each side.

begin to describe what happened to Plaintiff Peter Hagan at the hands of Defendant Warner/Elektra/Atlantic Corporation (herein "WEA") to further its improper race-biased agenda. Mr. Hagan a 49 year old Caucasian man who gave WEA 21 years of faithful and successful service as a sales executive for WEA. (See EEOC Charges, attached to Plaintiff's Complaint). His career was suddenly undermined in 1995 when he was demoted so that a patently unqualified young African-American male, Dale Hill, could take his place. Hagan's career disintegrated altogether four years later in 1999, when, in the thee of an office closure, he was denied the opportunity to transfer to another management position within the company for which he was clearly qualified, while the same position was offered to the less qualified and less experienced Dale Hill. While federal law allows private employers some leeway in encouraging and fostering the hire and advancement of qualified minorities, it does not allow them to run roughshod over the

***

B. Sufficient Evidence has been Adduced Into This Record Whereby a Jury Could Reasonably Conclude that WEA Engaged in Reverse Race Discrimination Against Pete Hagan when, in 1995, it Demoted Him to a Lower Ranking Position and Brought in Dale Hill to Take His Place.

It is well-settled in this circuit as well as in other circuits that a Plaintiff alleging reverse race discdminatiort can prove his case in one of two ways: First, through adducing *direct* evidence of bias by an employer against white employees in favor of minority employees, or, secondly by adducing *circumstantial* evidence which, if credited, would enable the jury to conclude that reverse discrimination has taken place.

Weberg v. Franks, 229 F. 3d 514-522 (6th Cir. 2000) 522-523. *Abeita v. Transamerica Mailings, Inc.,* 159 F. 3d 246, 522-523 (6th Cir. 1998); *Kline v. Tennessee Valley Authority,* 128 F. 3d 337 (6th Cir. 1997). An employer rarely admits up front that it is discriminating in favor of one race or another, thus supplying direct evidence of discrimination. Therefore, in most cases plaintiffs will attempt to prove their cases the second way, through reliance on indirect or circumstantial evidence of discrimination. In these cases, the federal courts invariably resort to the analytical framework set forth in *McDonell Douglas Corp. v. Green,* 411 U.S. 792 (1973). This framework requires a plaintiff to prove a *prima facie* case by meeting various criteria or "prongs". Assuming the plaintiff is successful in proving his *prima facie* case, the Defendant then has the burden of articulating a valid or non-discriminatory basis for the employment decision. Then the burden shifts back to the plaintiff to show that the reasons advanced by defendant are pretextual. *Id.* at 802 et seq.

It is important to note that if a plaintiff is proceeding under the "direct evidence" theory of proving reverse discrimination, he only needs to adduce that evidence, without having to prove a *prima facie* case through the cumbersome formula set forth in *McDonnell Douglas.* It is also important to note that a plaintiff can prove his case either through the direct method, or the circumstantial method. The methods are not mutually exclusive. *(Weberg* at 523).

In this case, Plaintiff has made out a case of reverse racial discrimination under both the direct evidence and circumstantial evidence methods of proof.

1. Direct Method

Peter Hagan adduced sufficient evidence whereby a jury could conclude that race was a direct factor in WEA's decision to demote Pete Hagan out of his position of Cleveland's Branch Sales Manager into a lower level position of Field Sales Manager so that WEA could achieve its overarching goal of promoting more blacks into positions of management and replacing Pete Hagan with Dale Hill. This circuit recently held that "direct evidence is 'that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's decision'." *Weberg supra* at 522; *Jacquelyn v. Schering-Plough Healthcare Prods Sales Corp.*, 176 F. 3d 921,926, (6th Cir. 1999); *Terbovitz v. Fiscal Court of Adair Cty.*, 825 F. 2d 111, 1 15 (6th Cir. 1987). In this case there is an impressive array of evidence which indicates a self avowed intent by WEA to aggressively push African-Americans, equally qualified or not, into higher positions of management. The first indication of this is the Affirmative Action Plan and related documents referenced in the "Factual Background" section supra at 7 through 11.

Plaintiff is well aware that the existence of affirmative action plans does not automatically fulfill the requirement of direct evidence, and has rejected Plaintiff's claims of reverse discrimination based merely on the *existence* of an affirmative action plan and no other circumstantial evidence. *Sampson v. Secretary of Transportation,* 1999 U.S. App. Lexis 14142 (6th Cir. 1999). The affirmative action plans and ancillary documents in this case reflect more than a general well-intentioned purpose of looking out for opportunities where they exist to seek out qualified black applicants, advance qualified minorities into open management positions, or***

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 02-3602

PETER M. HAGAN,
Plaintiff-Appellant,

v.

WARNER/ELEKTRA/ATLANTIC CORPORATION,
Defendant-Appellee.

On Appeal From
The United States District Court
for the Southern District of Ohio
Case No. C-1-00-412

FINAL BRIEF OF PLAINTIFF-APPELLANT,
PETER M. HAGAN, JR.

In Bass v. Board of County Commissioners, 256 F.3d 1095, 1110 (11th Cir. 2001), the Court held that the existence of an affirmative action plan, along with evidence that the plan was followed in an employment decision, even with good intentions,

constitutes direct evidence of unlawful discrimination.[4] *See also* M cGarry v. Board of County Commissioners of Pitkin, 175 F.3d 1193, 1200 (10th Cir. 1999); (hire of minority individuals in pursuit of goals of affirmative action plans, and policy statements made by hiring authorities in support of affirmative action objectives constitute direct evidence of discrimination.); Brown v. McLean, 159 F.3d 898, 904 (4th Cir. 1998); Cerrato v. San Francisco Community College Dist., 26 F.3d 968, 976 (9th Cir. 1994); McQuillen v. Wisconsin Educ. Ass'n Council, 830 F.2d. 659, 666 (7th Cir. 1987) .

In granting summary judgment to WEA, the lower found no direct evidence of reverse discrimination. The lower court noted that WEA had denied acting pursuant to its Affirmative Action Plans in its promotion of Hill over Peter Hagan in 1995 or its choosing Hill and other minority individuals over Mr. Hagan for vacancies in 1999, and that Mr. Hagan had adduced no direct evidence to the contrary. (R. 31 Order, at 24-25, Apx. 46-47).

* * *

[4] WEA has never defended on the basis that its plans were valid. However, in his Memorandum Contra (R. 24), Mr. Hagan cited persuasive case authority that WEA's plans were invalid. *See*, R. 24 at 26-27, Apx. 462-463.